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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1944**

## No. 45

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BESTER WILLIAM STEELE, PETITIONER,

*vs.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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**PETITION FOR CERTIORARI FILED MARCH 29, 1943.**

**CERTIORARI GRANTED MAY 29, 1944.**

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1943

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BESTER WILLIAM STEELE, PETITIONER,

*vs.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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[fol. 1] [File endorsement omitted]

[fol. 2] **IN CIRCUIT COURT OF JEFFERSON COUNTY**

CERTIFICATE OF APPEAL—May 24, 1943; filed in Supreme Court of Alabama May 26, 1943

I, G. H. Boyd, Register of the Circuit Court, Tenth Judicial Circuit of Alabama, In Equity, hereby certify that in the cause of Bester William Steele, Plaintiff, vs. Louisville & Nashville Railroad Company, a Corporation, et al., Defendants, which was tried and determined in this Court on the 27th day of April, 1943, an appeal was taken by the Complainant, Bester William Steele, from the Decree which is in words and figures as follows:

"Decree on Demurrers

"This cause coming on to be heard is submitted for decree upon demurrer of Respondent Louisville & Nashville Railroad Company refiled to the substitute bill of complaint, and demurrer of respondent Brotherhood of Locomotive Firemen and Enginemen to the substitute bill of complaint and the demurrer of W. H. Thomas to the substitute bill of complaint.

"The substitute bill of complaint charges a conspiracy amount the respondent Railroad Corporation, the Brotherhood of Locomotive Firemen and Enginemen, its representatives and its several members to fraudulently eliminate from the services of the Railroad the complainant and other negro firemen, or to discriminate against them in such a way as to give the white firemen, members of said association, advantage in employment status, rate of pay, etc., while the bill in general terms charges fraud and discrimination against the negro firemen, the specific wrong complained of is that representatives of the Brotherhood of Locomotive Firemen and Enginemen (who were statutory representatives of all firemen) and the respondent Louisville & Nashville Railroad Company entered into an employment agreement February 8, 1941, and modified on May 12, 1941, under the terms of which negro firemen, including the *com-* complainant, suffered injury and damage.

[fol. 3] "From a careful analysis of the bill it appears that any relief to which plaintiff is entitled must be predi-

cated upon injuries sustained by him from the wrongful execution of the contract of 1941.

"The rights allegedly taken away from him by such contract arose from a former contract negotiated for him and others by the same Brotherhood. It is admitted by complainant that the Brotherhood of Locomotive Firemen and Enginemen has the legal right to select bargaining representatives for the entire class. It is also admitted that the universal practice among the railroads of the Country is to promote only white firemen to the position of engineer, and that complainant is one of a group of colored firemen who are non-promotable under such practice. No direct relief is here sought against that practice. The contract complained of discloses a plan of operation whereby the number of negro firemen is to be reduced and certain of their privileges under the former contract abridged.

"The contract of 1941 appears on its face as one designed to increase the number of promotable firemen. It makes available more men who may be ultimately promoted to the position of engineer. Such plan may have been necessary to the proper operation of the railroad. In any event the bill fails to negative such necessity or to aver that a contract more favorable to complainant and his class was a practical possibility. The general allegations of fraud and discrimination in the execution of the contract are not assumed to be true merely because its provisions are not as favorable to the entire group of employees, or a portion thereof, as were the provisions of a former contract.

"The Court is therefore of the opinion that the bill of complaint contains no equity; that the demurrers should be sustained and the bill of complaint dismissed. It is therefore, ordered, adjudged and decreed by the Court that the separate and several demurrers of the respondents, Louisville & Nashville Railroad Company, Brotherhood of Locomotive Firemen and Enginemen and W. H. Thomas to the substitute bill of complaint be and they are hereby separately and severally sustained and said bill of complaint is hereby dismissed. Court costs in this cause are hereby taxed against complainant for which let execution issue.

"Done and ordered, this the 27th day of April, 1943.

E. M. Creel, Circuit Judge, In Equity."

[fol. 4] therein rendered to the Supreme Court of Alabama, to be holden of and for said State, and has given a Security

for Costs with Bester William Steel, (L.S.), and Fidelity and Deposit Company of Maryland, By Nelle Steen, Attorney in fact, (Seal), as sureties on said Security for Costs, and that said Security for Costs has been duly approved.

I further certify that notice of said appeal was duly issued and served on the appellee on the 24th day of May, 1943.

Witness my hand and official seal, this the 24th day of May, 1943.

Signed: G. H. Boyd, Register.

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[fol. 5] Organization of Court—Omitted in printing

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In Circuit Court of Jefferson County

Bester William Steele, Complainant

vs.

Louisville & Nashville Railroad Company, A Corporation,

and,

Brotherhood of Locomotive Firemen, and Enginemen, an Unincorporated Association, Respondents

Original Bill—Filed August 30, 1941

[fol. 6] *To the Honorable Judge or Judges of Said Court:*

1. Your Complainant shows unto your Honor that he is a resident of Jefferson County, Alabama, and is over twenty-one years of age, that respondent Louisville & Nashville Railroad Company is a corporation, incorporated in the State of Kentucky, engaged in interstate commerce by rail transportation, the respondent Brotherhood of Locomotive Firemen & Enginemen (hereinafter called Brotherhood) is a national unincorporated labor union whose membership is principally derived from locomotive firemen and enginemen employed on interstate railroads, including the defendant railroad. It is composed of a Grand Lodge and over nine hundred subordinate Lodges including lodges and officers resident in the State of Alabama and Jefferson County.

2. Complainant is employed by the defendant Louisville & Nashville Railroad Company, on the S. & N. A. Division, with seniority rights as a fireman dating from February 4, 1910. He brings this action in his own behalf and as a class suit on behalf of the other Negro locomotive firemen on said defendant railroad, said other Negro locomotive firemen constituting a class so numerous as to make it impracticable to bring them all before the Court, and there being common question of law and fact, common grievances and common relief as well as special relief sought.

3. The defendant Louisville & Nashville Railroad Company has employed plaintiff and plaintiff is working for it under his individual contract with said Railroad which embodies the Locomotive Firemen and Hostlers Schedule issued March 1, 1929. Article 26 of said Schedule covers the seniority rights of plaintiff and provides that the oldest firemen in road service will have the preference of runs and promotion on the seniority territory to which assigned, when competent and worthy. Plaintiff states that he has an excellent service record and at all times has been and is now wholly competent and worthy for the service he was performing according to his seniority standing until wrongfully displaced as hereinafter stated.

4. The gravemen of the complaint herein lies in acts done pursuant to a conspiracy between the defendant Railroad and the Defendant Brotherhood in which certain [fol. 7] officials of the Railroad and certain officials of the Brotherhood acting on behalf of the Brotherhood as the exclusive bargaining agent under the Railway Labor Act of June 21, 1934 (U. S. Code, Title 45, Chap. 8) did inflict certain grievous wrongs upon plaintiff and the other Negro locomotive firemen then employed on the defendant Railroad individually and as a class. Plaintiff further complains of the defendant Brotherhood separately for the wrongs inflicted upon him individually and upon the Negro firemen on the defendant Railroad as a class as more fully hereinafter set forth.

5. Since the passage of the Railway Labor Act aforesaid the defendant Brotherhood by virtue of the fact its members constitute a majority of the craft or class of locomotive firemen on most of the interstate railroads of the

country, including the defendant railroad, has established itself throughout the country and with the defendant railroad as the exclusive bargaining agent and grievance representative under said Railway Labor Act with respect to rates of pay, rules and working conditions for all the locomotive firemen on said railroads, including the defendant Railroad, not only for its own members but also for the non-member Negro locomotive firemen whom it bars from membership in its organization solely because of race or color. It has further asserted itself under the Railway Labor Act as the sole representative for handling disputes between the said railroads and the individual locomotive firemen arising out of their individual employment contracts on said railroads. By reason of its great membership and nationwide organization, its large national treasury, its skill and power acquired through years of experience in the processes of collective bargaining and protecting the interest of its members it has acquired great prestige and coercive power over the interstate railroads, including the defendant railroad. In all matters herein complained of the Brotherhood has claimed as its source of authority to act and has purported to act under color of authority of the Railway Labor Act.

6. Membership in the defendant Brotherhood has always been and is now restricted by its constitution and practice to white locomotive firemen and enginemen, with Negro locomotive firemen excluded solely because of color. In an effort to obtain for its white member locomotive firemen a monopoly of employment on all railroads, including the defendant Railroad, and gradually to eliminate the Negro non-member locomotive firemen thereon, the Brotherhood [fol. 8] from time to time over a period of fifteen years or more has secretly negotiated with said railroads, including the defendant railroad, a series of agreements and modifications of agreements placing ever increasing strictures on the employment of Negro locomotive firemen and curtailing the seniority rights and prerogatives of Negro locomotive firemen actually in the service of said railroad, including the defendant railroad, to the special advantage of the white locomotive firemen members of the defendant Brotherhood. As a direct consequence of the Brotherhood's persistent course of discrimination against them, employment of Negro firemen on all rail-

roads, including the defendant railroad, has greatly declined, their job assignments have become less frequent and more irregular, their work more hazardous and burdensome as a class in comparison with the number; job assignments, earnings and conditions of work of the white locomotive firemen, members of the defendant Brotherhood, as a class. Further the defendant Brotherhood has sought a monopoly for its own members of employment on said railroads, including the defendant railroad, as locomotive firemen at the expense of the Negro locomotive firemen as a class.

7. On and prior to February 22, 1941, plaintiff was a locomotive fireman working on the S. & N. A. Division of the defendant railroad in the "pool," with mileage guaranteed per month, which amounted on an average between 4,100 and 4,500 miles per month, at the rate of $5.75 a hundred miles or $5.51 a hundred miles according to the class of engine he was firing. His average monthly pay check was about $225.00, after deductions of $7.65 for insurance; $2.60 for hospital fund, and $3.00 per $100.00 for retirement. By virtue of his seniority he was holding down one of the best assignments in said seniority territory (the S. & N. A. Division constituting in itself a seniority territory within the meaning of the Article 26 aforesaid).

8. The defendant Brotherhood in functioning as a sole and exclusive representative under the Railway Labor Act, particularly sections 151a and 152, Title 45, U. S. Code, of all the locomotive firemen on the defendant railroad owes a statutory and fiduciary duty to each locomotive fireman, including plaintiff and the other Negro locomotive firemen as a class, that it shall represent him loyally, in [fol. 9] good faith, that it shall not seek a monopoly or other special advantage for its members to the detriment of the non-member firemen, that it shall make full disclosure of all negotiations and other proposed actions affecting the individual fireman's rate of pay, rules and working conditions, that it shall give reasonable notice, opportunity to be heard, and a chance to vote to all locomotive firemen, members and non-members alike, on any action proposed, and prompt and full report on all action taken affecting his interest, and generally that it shall conform to and regard the rules of law and standards of conduct governing the relationship of principal and agent as

the statutory agent of all of the individual locomotive firemen on the railroad. Nevertheless in flagrant violation of its duties in the premises so far as plaintiff individually and the other Negro locomotive firemen as a class (same constituting a minority of all the firemen on the defendant railroad) are concerned, the defendant Brotherhood has persistently been unfaithful to its fiduciary relationship, has been and is now disloyal to plaintiff and the other non member minority Negro locomotive firemen as a class, has sought to force them out of employment and destroy their vested property rights in an effort to obtain a monopoly of employment (or failing that the most favored rates of pay, rules and working conditions, for its own members, has refused and still refuses to notify plaintiff and the other minority Negro locomotive firemen of proposed actions affecting their interest, to report its deeds done as their bargaining representative under the Railway Labor Act, and has refused and still refuses to give them fair, honest and faithful representation under the Railway Labor Act.

9. Although the Negro firemen constitute the minority group of firemen on the entire defendant railroad system, they constitute the majority group of the division to which plaintiff is assigned and in which he has seniority rights, to-wit: The S. & N. A. Division aforesaid. The Negro firemen there constitute eighty percent or more of the total number of firemen on said division; and up to the making of the agreement hereinafter referred to had exercised their vested seniority rights established under the individual contracts pursuant to the Schedule of March 1, 1929, aforesaid.

10. Nevertheless on or about February 18, 1941, effective February 22, 1941, the defendant railroad and the defendant Brotherhood, in concert with certain other railroads in [fol. 10] the group known as The Southeastern Carriers, in an effort by the Brotherhood to obtain for its membership the most favored rates of pay, rules and working conditions at the expense of plaintiff and other minority Negro locomotive firemen as a class, did enter into a secret, fraudulent agreement to impair and destroy plaintiff's vested seniority rights and the seniority rights of the other minority Negro locomotive firemen. A copy of said agreement is hereto attached as Exhibit I and the secret modification

of said agreement effected between the defendant railroad and the defendant Brotherhood on or about May 12, 1941 is hereto attached as Exhibit 2, and both are prayed to be read in full as part of this paragraph.

11. Negro firemen constitute the only class of non-promotable firemen who cannot under present railroad and labor custom be promoted regardless of efficiency, experience or other personal qualifications; and constitute the class discriminated against under the agreement and modification above mentioned.

12. As a result of the terms of said secret fraudulent agreement effective February 22, 1941, on or about April 7, 1941, the defendant Brotherhood in violation of its duty toward plaintiff as his exclusive bargaining representative under the Railway Labor Act as aforesaid did force the defendant railroad to breach its individual contract of employment with plaintiff, destroy plaintiff's seniority rights and wrongfully remove him from the assignment which he then held and which he was entitled to by virtue of his seniority, competence and worth, and without cause or excuse and solely because of his color and race did force the defendant railroad to replace him with white locomotive firemen, member of the defendant Brotherhood. In acting the defendant Brotherhood was seeking a fraudulent, preferential advantage for its own members, and a part of the class it represents against complainant and other minority Negro firemen as a class.

13. In consequence of the wrongful acts by the defendants aforesaid plaintiff's earnings have been reduced by over $50.00 a month, his work assignments have been more irregular and hazardous. Plaintiff's vested retirements under the Railway Retirement Act of June 24, 1937 (U. S. Code Title 45, Chap. 9) have been seriously impaired unless relief is granted by this Honorable Court.

[fol. 11] 14. Complainant has exhausted his administrative remedies outside of Court. He has appealed for relief and restoration of his vested seniority prerogatives to the highest operating officer of the defendant railroad with jurisdiction in the premises, and to the general chairman of the defendant Brotherhood representing the Brotherhood and the individual locomotive firemen, including himself, on the defendant railroad. Nevertheless he has been denied

all relief, and said wrongs have continued and will forever continue unless restrained and redressed by this honorable Court. And other minority Negro locomotive firemen on the defendant railroad have been injured and their vested seniority and retirement rights have been curtailed and destroyed by similar action on the part of the defendants.

Wherefore Premises Considered: Your petitioner prays that Louisville & Nashville Railroad Company, a corporation by service on R. E. Steiner at 1107-25 First National Bank Building, Montgomery, Alabama, and Brotherhood of Locomotive Firemen and Enginemen and Unincorporated Association, by service upon M. S. Goodwin at 1043 South McDonough Street, Montgomery, Alabama, respondents, be made parties to these proceedings by proper process; that they be required to plead, answer or demur thereto within the time prescribed by law, petitioner further prays that:

1. A permanent injunction against each of the defendants perpetually enjoining them and each of them from enforcing or otherwise recognizing the secret, fraudulent agreement above mentioned and any modification or modifications thereof.

2. Discovery by the Brotherhood of all agreements and negotiations undertaken by it with the defendant railroad since the Railway Labor Act of 1934 in which it purported to act under said Act as the exclusive bargaining agent for all the locomotive firemen on the defendant railroad, which have resulted in its occupying a hostile position or having conflicting interests with plaintiff and other non-member minority Negro locomotive firemen, regarding rates of pay, rules or working conditions of said firemen on the defendant railroad.

3. Restoration of plaintiff's and other Negro locomotive firemen's rights and recognition of the same apart from said secret fraudulent agreement and any modification or modifications thereof.

[fol. 12] 4. A permanent injunction against the defendant Brotherhood, its officers, subordinate lodges, members, agents, or attorneys perpetually enjoining them and each of them from purporting to act as representative or representatives under the Railway Labor Act for all the locomotive firemen on the defendant railroad, specifically plaintiff and other non-member minority Negro locomotive firemen,

so long as it or they refuse to give plaintiff and the other Negro locomotive firemen notice, opportunity to be heard and a vote on all matters affecting them individually or in common with the other locomotive firemen on defendant railroad as a class.

5. A decree binding on all parties hereto and their privies and those represented herein, settling and declaring the rights, interests and other legal relations of the respective parties in and to and by reason of the matters herein controverted.

6. Damages against the Brotherhood for loss of wages, destruction of vested seniority preference rights, and breach of its duty of representation under the Railway Labor Act, and the other injuries set forth above resulting from the Brotherhood's acts as set forth in the sum of Fifty Thousand ($50,000.00) Dollars.

7. Relief for the other Negro locomotive firemen on the defendant Railroad as a class in the same manner as herein prayed individually, and further as their interests may appear.

8. Plaintiff prays that he may have such other, further and proper relief in the premises to which he has shown himself entitled, and which may seem meet and proper to your Honor.

Arthur D. Shores, Attorney for Plaintiff; Charles H. Houston, Washington, D. C.; Arthur D. Shores, Birmingham, Alabama; J. T. Settle, Memphis, Tennessee; J. C. Waddy, Washington, D. C., Attorneys for Plaintiff.

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[fol. 13] *Duly sworn to by Bester William Steele: Jurat omitted in printing.*

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EXHIBIT # 1 TO ORIGINAL BILL

Agreement between The Southeastern Carriers' Conference Committee, Representing the Atlantic Coast Line Railway Company, Atlanta and West Point Railroad Company and Western Railway of Alabama, Atlanta Joint

Terminals, Central of Georgia Railway Company, Georgia Railroad, Jacksonville Terminal Company, Louisville and Nashville Railroad Company, Norfolk and Portmouth Belt Line Railroad Company, Norfolk Southern Railroad Company, St. Louis San Francisco Railroad Company, Seaboard Air Line Railway Company, Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company). The Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company (including Woodstock and Blockton Railway Company and Belt Railday Company of Chattanooga). New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Georgia Southern and Florida Railway Company, [fol. 14] St. John River Terminal Company, Harriman and Northeastern Railroad Company, Cincinnati, Burnside and Cumberland River Railway Company, Tennessee Central Railway Company, and the Brotherhood of Locomotive Firemen and Enginemen:

(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen or helpers on other steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for

promotion under the present rules and practices to the position of locomotive engineers.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. and E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required in addition to showing, in the opinion of manage- [fol. 15] ment, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extent over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examination for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who — not waived promotion, shall be called in their turn for promotion. When so called should

they decline to take such examinations for promotion or fail to pass as herein provided they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power [fol. 16] to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Employees: Brotherhood of Locomotive Firemen and Enginemen, D. B. Robertson, President. Brotherhood of Locomotive Firemen and Enginemen's Committee, W. O. Metcalfe, Chairman.

For the Carriers: Southeastern Carrier' Conference Committee, C. D. Mackay, Chairman; C. D. Mackay, H. A. Benton, C. G. Sibley, Committee Members.

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EXHIBIT NO. II TO ORIGINAL BILL

Agreement in connection with application on the L. & N. Railroad of Agreement between the Southeastern Carriers Conference and the Brotherhood of Locomotive Firemen and Enginemen, dated Washington, D. C., February 18, 1941, to become effective February 22, 1941, regarding the employment and assignment of firemen, as agreed by Mr. W. B. Porter, Asst. Director of Personnel, Mr. G. C. Howard, Asst. Director of Personnel, representing the L. & N. Railroad, and Mr. W. G. Metcalfe, General Chairman, representing the Brotherhood of Locomotive Firemen and Enginemen:

1. Q. What constitutes a new run under Article 2 (b) of the agreement above mentioned?

A. When it is changed to the extent that it is operated out of different terminals, the mileage lengthened or shortened to the extent of 20 miles per day, or the scheduled compensation on runs paid under Article 3, Section (a), of the general Agreement, changed to the equivalent of 20 miles per day, when a run is operated six days per week instead of seven, or vice versa, and new run hereafter inaugurated or any run discontinued and thereafter re-established. (See [fol. 17] Article 25, Sections 12 and 13.)

In yard service it is understood that a new job is when a job is changed from a six day job to a seven day job, or from a seven day job, to a six day job, or where the point for going on duty or being relieved is permanently changed as much as one-half mile, and any job hereafter inaugurated or any job discontinued and thereafter re-bulletined. Changing the off day without changing the number of days worked per week would not constitute a new job. (See Art. 25, Sections 12 and 13.)

*Adjusting Pool Boards:*

2. Q. In the matter of increasing first and second pool boards, where such pools are maintained, would the addition of one or more men to such pools be considered as a new job in the purview of Article 2 (b) of the above mentioned agreement?

A. Yes.

3. Q. In making reduction in the number of men in either the first or second pool, how would these reductions be made as regards promotable and non-promotable firemen?

A. Seniority will govern provided the percentage of promotable firemen will not reduce when such percentage is 50 or below.

*For Example:*

If the first pool firemen's board were increased from ten to twelve men, there being six non-promotable and four promotable men in that board, two promotable firemen should be added to bring the board up to twelve, or 50 per cent.

If a reduction were made in such board from twelve to ten or two men were to be cut off, one promotable and one non-promotable firemen would be cut off, provided the two junior firemen were promotable, but if three instead of two men were cut from the board, then one promotable and the two junior non-promotable men would come off.

To further illustrate: If in second pool there were 25 promotable and one non-promotable firemen and it was necessary to cut the board five men, the one non-promotable firemen would be allowed to remain in the pool provided he had seniority over the five promotable men cut off.

[fol. 18] To again illustrate: If the first pool had ten non-promotable and ten promotable firemen and the pool had to be reduced *for* men, or to sixteen. In the event non-promotable men had seniority over the promotable men, the promotable men would be cut off to the extent of reducing and maintaining the ratio 50-50. If there were six promotable and six non-promotable men in the pool, and it were necessary to cut two men off, the two junior firemen being non-promotable, they would be cut off under the seniority rules.

*Passenger Service:*

*Examples:*

4. Q. There are three groups of passenger runs, two firemen being assigned to each group—a total of six men, all non-promotable. Each fireman is required to lose three round trips per month account of mileage regulations. These runs are grouped together and seven firemen assigned to protect them in lieu of the gouge, working first in, first out. Under Article 26, Section 22, the six runs would be advertised.

*How should assignments be made?*

A. In the event the mileage of the six non-promotable firemen was not decreased to the extent of twenty miles per day, or the equivalent of twenty miles per day, these six men could not be disturbed, except under seniority rules. However, the senior promotable fireman bidding as the 7th man in the pool, would be assigned to the job.

5. Q. In the event the mileage or the equivalent thereof is decreased twenty miles per day, how would assignments then be made?

A. On seniority except that non-promotable firemen could not be assigned to more than 50% of the jobs.

6. Q. Should these same runs later be changed and six crew re-assigned as formerly, the 7th job being cut off, how should assignments then be made?

A. Senior applicant should be assigned.

7. Q. How should assignments be made, when the ratio of non-promotable to promotable firemen is 6 and 4, and a new run is added, requiring

(A) 1 additional firemen? Ans. Senior promotable [fol. 19] fireman should be assigned.

(B) 2 additional firemen? Ans. Two senior promotable firemen should be assigned.

(C) 3 additional firemen? Ans. Three senior promotable firemen should be assigned.

8. Q. Should another run be added requiring one fireman after the ratio has reached 6 non-promotable and 7 promotable firemen, how should assignments be made?

A. As the ratio of non-promotable to promotable is less than 50%, the senior applicant would be assigned whether non-promotable or promotable.

9. Q. In passenger service the ratio of non-promotable to promotable firemen stand 6 to 4. In this class there is a group of 3 passenger runs manned by four non-promotable and two promotable firemen. A new run is added to this group requiring two men and the entire group of runs is advertised, how should assignments be made?

A. Two promotable senior firemen should be assigned to the group.

10. Q. With the ratio in this class standing 6 and 6 "A" one of the promotable firemen is assigned as engineer. How should this vacancy be filled?

A. By senior promotable firemen.

11. Q. When "A" is cut off as engineer, to what run is he entitled?

A. To any run held by a junior fireman, either promotable or non-promotable.

12. Q. Should "A" displace a junior promotable fireman in this class, how should the latter be governed?

A. He should displace any junior fireman.

13. Q. If "A" displaces a junior non-promotable fireman in this class, how should the latter be governed?

A. He could exercise his seniority over any junior non-promotable firemen provided that in doing so the non-pro-

motable firemen should not be assigned to more than 50% of any class of service.

14. Q. The ratio in passenger service is 50-50. There are [fol. 20] four runs one of which is discontinued and the remaining three runs in the group are readvertised for six men. How should assignment be made?

A. To the senior applicant unless — so doing the ratio of non-promotable firemen would exceed 50%, in which event sufficient promotable junior firemen should be assigned to prevent non-promotable firemen exceeding 50%.

15. Q. The ratio of non-promotable to promotable firemen in passenger service is 5 and 8. A new run is bid, requiring:

(A) Two men. (B) Three men. (C) Four men.

How should assignments be made?

A. (A) Senior applicants would be assigned.

(B) Senior applicants would be assigned.

(C) Senior applicants would be assigned,

unless by so doing the ratio of non-promotable to promotable firemen would thereby exceed 50%, in which event sufficient junior promotable firemen would be assigned to avoid this.

*Assigned Through Freight Service:*

16. Q. The ratio of non-promotable to promotable firemen is 8 and 5. One of the non-promotable firemen gives up his run and takes pool service, how should his vacancy be filled?

A. By the senior applicant.

17. Q. Should the senior applicant be promotable fireman in the same class, how should this vacancy be filled?

A. By the senior applicant.

18. Q. The ratio of non-promotable to promotable firemen is 7 and 5. A non-promotable fireman dies, is discharged, resigns, or is disqualified, how should this vacancy be filled?

A. By the senior applicant. (promotable)

19. Q. The ratio of non-promotable firemen is 5 to 7. A non-promotable fireman dies, is discharged, resigned, or is discharged, how should his place be filled?

A. By the senior applicant.

20. Q. The ratio of non-promotable to promotable firemen is 6 and 6. A new run is added requiring two men, how should the assignment be made?

A. By the senior applicant unless both are non-promotable firemen, in which event the senior promotable fireman [fol. 21] and senior nonpromotable firemen should be assigned.

21. Q. The ratio of non-promotable firemen to promotable firemen is 6 and 6. A new run is added requiring three men, how should assignments be made?

A. The senior applicant, unless they are all non-promotable firemen, in which event one senior non-promotable and two senior promotable firemen will be assigned.

*First Pool:*

22. Q. The ratio of non-promotable to promotable firemen in first pool is 6 and 4. At the adjustment period, two men are added to the pool. How should assignments be made?

A. The two senior promotable applicants should be added.

23. Q. The ratio of non-promotable firemen to promotable firemen in the first pool is 6 and 4. At the adjustment period two men are to be taken out of pool. Should non-promotable or promotable men be taken out?

A. The two junior non-promotable firemen should be taken out of the pool.

24. Q. The ratio of non-promotable firemen to promotable firemen in first pool is 6 and 6. At adjustment period two men are to be taken out. Should non-promotable or promotable men be taken out?

(A) Two junior men being non-promotable.

(B) Two junior men being promotable.

(C) One of the junior men being non-promotable and one being promotable?

A. (A) Seniority would govern and the two junior men would be taken out of the pool.

(B) The junior promotable and the junior non-promotable would be taken out of the pool.

(C) Seniority would govern.

25. Q. With the same ratio under same circumstances as outlined next above, three men are to be taken out of the pool:

(A) The three junior men being non-promotable.

(B) The three junior men being promotable.

(C) The two junior men being non-promotable and the next junior man promotable.

[fol. 22] A. (A) Seniority would govern.

(B) One junior promotable man and the two junior non-promotable men would be taken out.

(C) Seniority would govern.

Q. (D) The two junior men being promotable and two next junior men being non-promotable.

A. (D) The junior promotable man and two junior non-promotable men.

26. Q. When "A" is cut off as engineer, how should he place himself?

A. He may displace any junior fireman.

27. Q. The ratio of promotable and non-promotable firemen is 6 and 6. "A" is assigned as engineer, how should his vacancy be filled?

A. By senior promotable fireman.

28. Q. The ratio of non-promotable to promotable firemen in first pool is 7 and 6. "A" is assigned as engineer. How should his vacancy be filled?

A. By senior promotable applicant.

29. Q. "A" is later cut off as engineer. How should he place himself?

A. He may displace any junior fireman.

*Second Pool:*

30. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 6. The first pool at adjustment period is reduced two men, resulting in displacement of two men in second pool. Who should be displaced?

(A) If the two junior men in second pool were promotable men?

(B) If the two junior men in second pool were non-promotable men?

(C) If the two junior men in the second pool were one promotable and one non-promotable.

A. (A) The junior non-promotable man and the junior [fol. 23] promotable man should be taken out of the pool.

(B) Seniority would govern.

(C) Seniority would govern.

31. Q. The ratio of non-promotable men to promotable men in the 2nd pool is 6 and 7. The first pool at adjustment period is reduced *tow* men, resulting in displacement of two men in second pool. Who should be displaced?

(A) If the two junior men were promotable?

(B) If the two junior men were non-promotable?

(C) If the two junior men were one promotable and one non-promotable?

A. (A) The junior non-promotable and the junior promotable men would be taken out.

(B) Seniority would govern.

(C) Seniority would govern.

32. Q. The ratio of non-promotable to promotable men is 6 and 8 in the second pool. The first pool at adjustment period is reduced 2 men, resulting in displacement of two men in second pool. Who should be displaced:

(A) If the two junior men were promotable?

(B) If the two junior men were non-promotable?

(C) If the junior men were one promotable and one non-promotable.

A. (A) Seniority would govern.

(B) Seniority would govern.

(C) Seniority would govern.

33. Q. The ratio of promotable men to non-promotable men is 6 and 6. There is a vacancy as hostler and no bids received, and the junior promotable fireman is assigned. If it is necessary to fill the latter's place in second pool, should the non-promotable or the promotable cut off fireman be assigned to the pool?

A. Senior promotable cut off man should be assigned.

34. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 7. A vacancy as hostler is advertised and no bids received, the junior promotable fireman being assigned. It is necessary to fill the latter's [fol. 24] place. Should the senior promotable or non-promotable fireman be added to the second pool?

A. The senior cut off promotable fireman should be added.

35. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 8. A vacancy for hostler is advertised and no bids received; the junior promotable fireman being assigned. It is necessary to fill the latter's place. Should the senior promotable or non-promotable cut off fireman be added to the second pool?

A. The senior cut off should be added.

It is understood by both parties to this agreement that it became effective March 15, 1941, and no transaction that took place prior to March 15th, is considered as coming under the terms of Washington Mediation Agreement of February 22, 1941.

Accepted for the Employees (S.) W. G. Metcalfe, General Chairman, B. L. F. & E.

Accepted for the L. & N. Railroad Co. By (S.) R. C. Parsons, Director of Personnel.

Louisville, Kentucky, May 12, 1941.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF RESPONDENT LOUISVILLE & NASHVILLE RAILROAD COMPANY—Filed October 3, 1941

Comes the Respondent, Louisville & Nashville Railroad Company, and demurs to the Bill of Complaint, and as grounds of demurrer, assigns the following, separately and severally:

1. There is no equity in the Bill.

2. Said Bill alleges as a conclusion, alleged seniority rights of the complainant as a fireman.

3. The averments of said Bill are not sufficient, definite or certain as to what alleged seniority rights the said complainant is claiming in said cause.

4. The averments of said Bill that the said complainant was possessed of seniority rights as a fireman were alleged as a conclusion of the complainant, and no facts are alleged sustaining the averment.

[fol. 25] 5. The said Bill fails to allege in substance or in haec verba any contract between the complainant and the

respondent, Louisville & Nashville Railroad Company, whereby and under which the said complainant is entitled to any contractual rights of seniority.

6. For that said Bill fails to allege or set out facts which entitle him to maintain said suit on behalf of a class.

7. For that no right is shown in the complainant to prosecute said suit on behalf of a class, and said Bill fails to allege the consent or authority from such a class to the said complainant to bring and prosecute said suit.

8. Said Bill fails to allege the substance or in haec verba the alleged individual contract between the complainant and the respondent.

9. For that the averments of said Bill show that the said complainant commenced his service with the defendant on or about February 4, 1910 and claims the benefit individually of a contract between the Company defendant and the Locomotive Firemen and Hostlers of March 1, 1929.

10. For that said Bill of complaint shows that the said complainant is asking the benefits of the alleged contract between the Railroad and the Locomotive Firemen and Hostlers' Schedule issued on March 1, 1929, and is unwilling to abide by the terms, provisions and conditions of said alleged schedule or contract.

11. For that there is no equity in said Bill, in that the complainant seeks to obtain the benefits of an alleged contract between the defendant Company and the Brotherhood of Locomotive Firemen and Hostlers of March 1, 1929, and is unwilling to abide by the other terms, provisions and conditions of said alleged contract.

12. For that said Bill fails to allege that the said complainant is such a fireman as is entitled to the alleged preference of runs and promotion on seniority territory as are the members of the Locomotive Firemen and Hostlers' Brotherhood.

13. Said Bill fails to allege or set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

[fol. 26] 14. Said Bill of Complaint shows that plaintiff is seeking to obtain the benefits of an alleged contract between

the defendant Company and the Locomotive Firemen and Hostlers' Schedule of March 1, 1929, as though he were a member of said Brotherhood or Association, without the averment that he is a member of said Brotherhood or Association.

15. Said Bill fails to allege what the alleged conspiracy was between the said railroad and the defendant Brotherhood.

16. Said Bill does not allege facts sustaining the averment of conspiracy between the railroad and the defendant Brotherhood.

17. Said Bill alleges conspiracy between the railroad and the defendant Brotherhood, as a conclusion of the pleader.

18. The averments of said Bill fail to allege the name of the officials of the railroad Company who are alleged to have entered into a conspiracy with the Brotherhood or that their names are unknown.

19. For that said Bill fails to allege that the alleged officials of the railroad Company at the time of acting in pursuance of an alleged conspiracy were in so acting, acting within the line, scope and course of their employment.

20. For that the averments of said Bill of Complaint show that such action as was taken by the railroad Company is under and by virtue of the provisions of law, namely, Railway Labor Act of June 21, 1934.

21. The averments of said Bill show that the defendant railroad company had no alternative but to treat and act with the legally established bargaining agency under the provisions of the Railway Labor Act.

22. For that complainant's recourse is through means of revised legislation, if the effect of the operation of the Railway Labor Act and the law is such that it inflicts grievous wrongs upon the said complainant.

23. Said complainant complains in this suit of the effect and operation of laws duly passed and adopted by the Con- [fol. 27] gress of the United States, and his remedy and recourse, if said laws work a wrong or injustice upon him, is by repeal of the same.

24. For that the averments of said complaint construed most strongly against the complainant show that the said defendant did nothing more than to comply with the law.

25. For that the averments of said Bill of complaint show that the defendant complied with the law, and such compliance with the law cannot be construed as working a wrong or injury upon the said complainant.

26. The averments of said Bill of complaint show the legal creation of a bargaining agency by the Brotherhood and fails to allege any acts or conduct upon the part of the defendant in violation of the provisions of law, on the other hand, the averments of said Bill show so far as the defendant railroad Company is concerned, a compliance with the provisions of the law.

27. For that said defendant railroad Company is not alleged in any way to be responsible for the creation of the bargaining agency of the Brotherhood, nor any participation in its creation and maintenance.

28. Said Bill fails to allege facts showing the responsibility of the defendant railroad Company for the creation of the Brotherhood, or of its bargaining agency.

29. Said Bill of complaint fails to allege any wrong doing by the defendant Louisville & Nashville Railroad Company.

30. For that the averment of facts in said cause contradicts and repudiates the averment of conclusion averred in said Bill that the defendant railroad is guilty of conspiracy.

31. For that the right of the Brotherhood to act as the sole representative and bargaining agency is in no wise controverted or disputed by the said complainant.

32. For that under the averments of said Bill, the agreements made and entered into by and between the railroad and the legally created bargaining agency are binding upon the said complainant and other individuals.

33. For that the said complainant is not entitled to receive the benefits of the acts and agreements of the alleged bargaining agency or the Brotherhood and to revoke and repudiate the other provisions and conditions of its contract [fol. 28] with the railroad company.

34. For that said Bill shows that the Louisville & Nashville Railroad Company did not willingly enter into any

contract or agreement prejudicial or injurious to the said complainant.

35. For that the acts of the said railroad with the bargaining agency created under the provisions of the Railway Labor Act are legal.

36. The said defendant by operation and effect of law, is prohibited and restricted from participating in the membership of the Brotherhood.

37. The averment that the Brotherhood has secretly negotiated with the railroad Company is a conclusion of the said complainant, and said Bill fails to allege in substance or in haec verba any agreements or substance of agreements made and entered into secretly between the railroad and the Brotherhood.

38. Said Bill of Complaint fails to allege any discrimination against the said complainant by the said railroad Company.

39. For that said Bill of Complaint fails to allege any treatment or consideration of the complainant by the Railroad Company different from that provided by the terms and provisions of a contract or agreement duly made and entered into by and between the Railroad Company and the bargaining agency of the Brotherhood.

40. Said Bill is indefinite and uncertain as to its averments as to how or by what process the said complainant has lost any substantial monthly wage.

41. Said Bill fails to allege the breach of any statutory or fiduciary duty owing by the defendant railroad Company to the said complainant, and the breach thereof proximately resulting in injury or damage to the said complainant.

42. Said Bill of Complaint fails to allege the responsibility of the defendant railroad Company for any lack of loyalty or good faith to the said complainant by the said Brotherhood.

43. For that the averment of fact contained in said Bill of Complaint fails to allege any failure on the part of the defendant railroad Company to comply with the terms and provisions of law.

[fol. 29] 44. Said Bill fails to allege that the defendant has at any time denied to the complainant his right of negotiation with the defendant as to his rate of pay, rules and working conditions.

45. Said Bill fails to allege any responsibility on the part of the defendant railroad Company for any alleged unfaithfulness or disloyalty on the part of the Brotherhood to the said complainant.

46. For that said Bill fails to allege that the alleged contract between the defendant and the Brotherhood of date February 18, 1941, was illegal or unlawful in any respect.

47. Said Bill of Complaint fails to allege that there was any lack of authority upon the part of the Brotherhood to negotiate * * * and effect the contract of February 18, 1941.

48. The averments of said Bill of Complaint show that the alleged Brotherhood forced the defendant, railroad Company into the making of the alleged contract complained of, and that in so forcing the railroad Company into the execution of said contract, that the said Brotherhood was acting within its legal rights, power and authority, and there is no averment that the said defendant voluntarily or willingly entered into said contract or at any time breached the same.

49. Said Bill of Complaint fails to allege or state facts showing that the said complainant is entitled as against this defendant to perpetually enjoin it from carrying out and executing its contract with the bargaining agency under the Railway Labor Act.

50. For that said Bill shows that the bargaining agency with whom the defendant railroad Company dealt in this cause was legally designated by proper authority without interference, influence or coercion on the part of this defendant Company, and that said bargaining agency was legally created and that therefore, under the provisions of law, the defendant railroad Company had no alternative but to comply with the provisions of the law in dealing with said agency, and that the contract between the agency and the railroad was and is a legal contract.

51. For that under the provisions of the law, failure of the defendant to comply with the provisions of the Railway [fol. 30] Labor Act would constitute a violation of the law on the part of said railroad Company.

52. For that the effect of the relief sought by the complainant in this cause, would be to force the defendant railroad Company to violate the law as enacted by the Congress of the United States.

53. For that under the averments of said Bill of Complaint, the defendant railroad Company has done no more than to comply with the provisions of the Railway Labor Act.

54. For that the averments of said Bill of Complaint show the making of a legal contract, and a legal contract having been made by and between the railroad and the representative bargaining agency, the said bargaining agency was possessed of the right to an enforcement of the contract, and the enforcement of the provisions of the contract gives to complainant no just cause or ground of complaint.

55. For that under the provisions of the Railway Labor Act, the defendant railroad Company was under affirmative duty to treat only with the bargaining agency created by the Brotherhood, and with no other.

Chas. H. Eyster, Gibson & Gibson, by White E. Gibson, Solicitors for defendant, Louisville & Nashville Railroad Company.

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In Circuit Court of Jefferson County

Plea in Abatement by Respondent Brotherhood—Filed October 4, 1941

Comes the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, named in the Bill of Complaint in this cause as a party respondent thereto, and appearing specially for the purpose of this Plea in Abatement, for testing the jurisdiction of this Court over this association and over this cause of action and the jurisdiction of this Court to entertain this cause of action

as against this association, and for no other purpose, enters the following Plea in Abatement:

The Brotherhood of Locomotive Firemen and Enginemen for plea says that this action is not a cause of action for or upon which the complainant herein may maintain such [fol. 31] an action against and *and* in the name of this association, and this Court has no jurisdiction to entertain this cause of action against and in the name of this association under the laws of the State of Alabama, for the reasons hereinafter set forth, all of which this association is ready to verify:

(1) The original Bill of Complaint does not show that this action is maintainable against the members generally of this association.

(2) The original Bill of Complaint shows that the documents constituting Exhibits 1 and 2 of said Bill of Complaint were not executed for or on behalf of the members of this association, and in fact they or either of them were not executed for or on behalf of the members of this association; but said Bill of Complaint shows, on the contrary, that it pertains and was intended to be applicable only to the locomotive firemen employed on certain railroads in the southeastern part of the United States.

(3) The original Bill of Complaint does not allege that the execution of the documents constituting Exhibits 1 and 2 of the original Bill of Complaint, which the complainant charges were executed pursuant to an unlawful conspiracy and are invalid, was either authorized or ratified by the members of this association. In fact the execution of the said documents was neither authorized nor ratified by the members of this association.

(4) The original Bill of Complaint does not allege that the persons whose names appear on Exhibits 1 and 2 of the original Bill of Complaint as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen's Committee were authorized by the members of this association to execute the said documents, or that the execution of said documents was ratified by the members of this association. In fact said persons were not authorized by the members of this association to execute said contract.

and neither was the execution of said contract ratified by the members of this association.

Wherefore, this association prays judgment of the said summons and Bill of Complaint and that the same be quashed.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Attorneys for Brotherhood of Locomotive Firemen and Enginemen, appearing specially as aforesaid.

[fol. 32] *Duly sworn to by William Liffiton. Jurat omitted in printing.*

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IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRY OF SUBMISSION OF PLEA IN ABATEMENT—November 12, 1941

On November 12, 1941, it is ordered by the Court that this cause be submitted on the sufficiency of the plea in abatement.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

DECREE HOLDING PLEA IN ABATEMENT INSUFFICIENT—Filed November 12, 1941

This cause coming on to be heard is submitted upon the sufficiency of a plea in abatement filed by the respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, and the Court having considered and understood the same is of the opinion that said plea is insufficient. It is, therefore,

Ordered, Adjudged and Decreed by the Court that the plea in abatement of the respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, be and it is hereby held to be insufficient and said respondent is hereby allowed twenty (20) days from this date within which to amend its plea if it so desires. It is, further, Ordered, Adjudged and Decreed by the Court that this cause be and it is hereby set for hearing on pleadings as herein noted, Monday, December 15, 1941, at 9:30 o'clock, A. M.; at said time should an amended plea be filed a sub-

[fol. 33] mission and argument will be had on the sufficiency of said plea and without prejudice to said Brotherhood of Locomotive Firemen and Enginemen, their demurrer will be submitted along with a submission on the demurrer of the other respondent, and then argued, if desired.

Done and Ordered, this the 12th day of November, 1941.

E. M. Creel, Circuit Judge, In Equity Sitting.

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF L. & N. R. R. Co.—Filed November 12, 1941

Comes the defendant, Louisville & Nashville Railroad Company, and by and with leave and consent of the Court first had and obtained, demurs to certain aspects of said Bill of Complaint, as follows:

A

The defendant demurs to that aspect of the Bill of Complaint by which the complainant seeks as an individual the benefits of the alleged contract between the Railroad and the Locomotive Firemen and Hostlers of March 1, 1929, and as grounds of demurrer, assigns the following, separately and severally:

56. For that there is no equity in said aspect of said Bill.

57. For that the said complainant seeks the benefits of said contract and is unwilling to accept the provisions of said contract to his detriment.

58. For that if the said plaintiff is benefitted by the Brotherhood in the procurement for him of individual rights and benefits under the contract made by the Brotherhood, then he is obligated to accept and be governed by those provisions of the contract which place obligations on him.

59. For that under said contract of March 1, 1929, the benefits of which complainant seeks in this proceeding, the right to make and interpret contracts, rules, rates and working conditions for locomotive firemen and hostlers is vested in the legally constituted committee of the Brotherhood of Locomotive Firemen and Enginemen and the general officials of the Railroad.

60. In order for plaintiff to have as an individual the [fol. 34] benefits of the contracts made by the Brotherhood, he must be willing to abide by the other terms, provisions and conditions of said contract, and the right to make and interpret said contracts as vested in the Brotherhood.

B

And the defendant demurs to that aspect of the Bill by which he admits the legality of the creation and existence of the Brotherhood as a Collective Bargaining Agency for the firemen and is unwilling to abide by the action of said Agency, and as grounds therefor, assigns the following:

61. For that there is no equity in said aspect of the Bill.

62. For that said Bargaining Agency is shown to be a legally constituted agency of a majority of the employee firemen, and hostlers of the defendant Company, and their action binding on their own members and other firemen in the service of the railroad Company.

63. For aught that is shown by said Bill of Complaint, the said agreement between the Brotherhood and this defendant is in a furtherance of an effort on their part to maintain a harmonious and agreeable working relation between the said two parties concerning rates of pay, rules, and working conditions.

64. For that the averments of said Bill show that the Brotherhood was designated by the Firemen and Hostlers authorized to designate and select the Bargaining Agency without interference, influence or coercion by this defendant Railroad Company, and such agency clothed with authority to make and enter into contracts and interpretation thereof with the railroad Company.

65. The said Bargaining Agency is shown to have been organized and elected by the Firemen and Hostlers of the defendant Company, and that the said Brotherhood was legally elected as a representative of the said firemen for the purposes of the Railway Labor Act.

66. For that said Bill fails to allege or charge in any way that the defendant Railroad was in anywise responsible for failure of the said plaintiff to be a member of the Brotherhood organization.

67. For that said Bill fails to allege that the said contract is not in the interest of public welfare.

68. Said Bill fails to allege that any contracts between the Brotherhood and the railroad were not legally made and entered into.

[fol. 35]

C

To That Aspect of the Bill Charging the Defendant With Acting Pursuant to a Conspiracy Between the Railroad and the Brotherhood, the Defendant Demurs, and as Grounds of Demurrers, Assigns the Following, Separately and Severally:

69. For that there is no equity in said aspect of the Bill.

70. For that said Bill fails to allege any individual contractual obligation or duty to the plaintiff which it has breached.

71. For that said defendant has only negotiated and consummated contracts and agreements with the Brotherhood, the official representative of the Firemen, and this, under the Railway Labor Act, it was required and obligated to do.

72. Said Bill fails to allege that any duly authorized officials of the Railroad Company acting within the line, course and scope of their employment entered into or committed any act in conspiracy with the Brotherhood.

73. For that the said Railroad Company is in no wise responsible for the acts of the official of the Brotherhood.

74. Said complainant has no ground of recourse against the defendant Company for any alleged wrong done to him by the Brotherhood.

D

To That Aspect of the Bill Alleging the Restriction in Membership of the Brotherhood, the Defendant Assigns the Following Demurrers, Separately and Severally:

75. For that there is no equity in said aspect of the Bill as against this defendant.

76. For that by operation of law, the defendant is prohibited from participating in the policies and organization of the Brotherhood and in designating and determining its membership.

77. The said complainant has no right at law or equity to hold this defendant liable for any lack of interest in the welfare of the complainant by the Brotherhood.

88. Said defendant is not alleged to have been a party in anywise to conducting a secret negotiation and the duty of disclosing to the complainant negotiations had between the Brotherhood and the defendant Company is upon the [fol. 36] Brotherhood, and not upon the defendant Company.

89. For that any lack of promotion, or any failure of assignments to complainant is not shown to be the act of the defendant.

E

To That aspect of the Bill charging disloyalty or breach of alleged fiduciary duty to the complainant, the defendant demurs, and assigns the following grounds, separately and severally:

90. For that said aspect of the Bill is without equity as to this defendant.

91. For that under the averments of said Bill of Complainant, the said defendant Railroad, owes to the said complainant, no statutory duty, except to treat with the Brotherhood, the Collective or bargaining Agency and representative of a majority of the firemen and hostlers and the benefit of whose contract the plaintiff has accepted.

92. Under the averments of said bill, the defendant is under no fiduciary duty to the said complainant.

93. Said defendant is under no duty or obligation to disclose to the individual complainant all negotiations had by the defendant and the Brotherhood, and for any lack of disclosure of such negotiations by the Brotherhood, this defendant is in no wise responsible.

94. For that said Bill shows no act on the part of the defendant to destroy or impair any alleged vested property right of the complainant.

F

To that aspect of the Bill alleging the making of a contract or agreement of February 18, 1941, the defendant demurs on the following grounds, separately and severally:

95. For that there is no equity in said aspect of the Bill as to this defendant.

96. For that said defendant is not chargeable with any alleged secret and fraudulent act on the part of the said Brotherhood in its negotiations with the defendant for said contract.

97. The said defendant is not responsible to the complainant for the results to the complainant individually of said contract of February 18, 1941, and interpretation thereof.

White E. Gibson, Chas. E. Eyster, Attys. for L. & N. R. R. Co.

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[fol. 37] In Circuit Court of Jefferson County

Amendment to Plea in Abatement by Brotherhood—Filed December 4, 1941

Comes the respondent, Brotherhood of Locomotive Firemen and Enginemen, and still appearing specially for the purpose of testing the jurisdiction of this Court over this cause of action and this party respondent, and for the purpose of pleading in abatement for no other purpose, amends its plea in abatement heretofore filed by inserting therein after Paragraph (4) the following:

(5) The Brotherhood of Locomotive Firemen and Enginemen is a voluntary association of persons employed as locomotive firemen and engineers at the time of admission to membership. It is a labor organization, or union, organized for the purpose of obtaining better wages and working conditions for its members, and not organized for trade or profit. It has more than nine hundred lodges located at terminal points on railroads, and more than ninety-five thousand members residing in every state of the United States and in every province of Canada.

Harold C. Heiss, Lange, Simpson, Brantley and Robinson, Attorneys for Brotherhood of Locomotive Firemen and Enginemen, Still appearing Specially as aforesaid.

*Duly sworn to by D. B. Robertson. Jurat omitted in printing.*

[fol. 38] IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF BROTHERHOOD—Filed December 15, 1941

I

Comes the respondent, Brotherhood of Locomotive Firemen and Enginemen, and demurs to the bill of complaint in this cause presented against it, as a whole, and as grounds of said demurrer sets down and assigns the following, separately and severally:

1. There is no equity in the Bill.

2. It affirmatively appears therefrom that this action is not maintainable against the members of this association generally.

3. For that it does not appear therefrom that this cause of action is a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

4. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

5. For that the Bill of Complaint does not allege that the persons whose names appear on Exhibits 1 and 2 of the original Bill of Complaint as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by the members of this association to execute the same document or that the execution of said document was ratified by the members of this association.

6. For that it affirmatively appears therefrom that the execution of the document constituting Exhibits 1 and 2 of said Bill of Complaint were neither authorized nor ratified by the members of this association.

7. For that it does not appear therefrom that the documents constituting Exhibits 1 and 2 of the said Bill of Complaint were executed for or on behalf of the members of this association.

8. For that it affirmatively appears therefrom that the documents constituting Exhibits 1 and 2 of said Bill of

Complaint were not executed for or on behalf of the members of this association.

[fol. 39] 9. For that the allegation that complainant is employed by the defendant, Louisville & Nashville Railroad Company, of the S. & N. A. Division, with seniority rights as a fireman is a conclusion of the pleader.

10. For that the averments of the Bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

11. For that there are no facts alleged which show that complainant was entitled to seniority rights, nor is there any averment as to what seniority rights plaintiff was entitled.

12. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

13. For that it affirmatively appears therefrom that the complainant has no right to maintain this Bill on behalf of the other negro firemen.

14. For that it appears therefrom that the measure and extent of complainant's damages as well as the class of complainant's damages is materially different from that of others constituting the class which he seeks to represent.

15. For that it does not appear therefrom that the complainant has the consent or authority of the class which he seeks to represent.

16. For that it does not appear therefrom that the other members of the class which complainant seeks to represent have seniority rights or that their rights have been affected in any way by the action complained of.

17. For that the said Bill of Complaint shows that said complainant is asking the benefits of the alleged contracts between the railroad and the locomotive firemen and hostler's schedules issued on March 1, 1929, and is unwilling to abide by the terms, provisions and conditions of the said alleged schedule or contract.

18. For that it does not appear therefrom that complainant, or any of the class which he seeks to represent, have

sustained any injuries or damages as a result of the action complained of.

[fol. 40] 19. For that there are not alleged therein any facts which make the alleged contract constituting Exhibit-1 and 2 of said Bill of Complaint illegal, unconscionable or unfair.

20. For that it affirmatively appears therefrom that both parties respondent were free contracting agencies and had right to make and enter into the contracts set out as Exhibits to the Bill.

21. For that the relief prayed for in the Bill would be an undue interference with the rights of the parties respondent to contract as they have a right to do.

22. For that there is a misjoinder of parties complainant in that complainant seeks to combine a personal claim for damages with a claim of the negro firemen of the class for equitable relief.

23. For that the interest and injuries of the negro firemen do not sufficiently appear to enable the Court to adjudicate their rights in the premises.

24. For that an action for damages cannot be brought on behalf of a class.

25. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

26. For that no reason is alleged why this association cannot execute any contract if so desired for the benefit of its members.

27. For that said Bill fails to allege or to set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

28. For that said Bill of Complaint shows that complainant is seeking to obtain the benefits of an alleged contract between the defendant company and this association as though he were a member of the said brotherhood or association, without the averment that he is a member of said brotherhood or association.

29. For that said Bill fails to allege what the alleged conspiracy was between the said railroad and this respondent.

30. For that said Bill does not allege facts sustaining the averment of conspiracy between the railroad and this respondent.

[fol. 41] 31. For that the allegation of the conspiracy between the railroad and this respondent is a conclusion of the pleader.

32. For that a corporation is incapable of entering into a conspiracy.

33. For that a voluntary association is incapable of entering into a conspiracy.

34. For that it is not alleged that any of the members of this association entered into a conspiracy or that they authorized, ratified or condoned a conspiracy.

35. For aught that appears therefrom, the members of this association had no knowledge and were not parties in any way to the said contracts.

36. For that it is not alleged that the persons whose names appear on the said contract or any of them were agents, servants or employees of the members of this association, acting within the line, scope and course of their employment as such.

37. For that the allegations that this association was acting as exclusive bargaining agent under the Railway Labor Act of June 21, 1934, is a conclusion of the pleader and no facts are alleged to support the said conclusion.

38. For that the conplainant has an adequate remedy at law.

39. For that the said Bill of Complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the respondent railroad company by way of damages for breach of contract.

40. For that there are no facts alleged showing that plaintiff will suffer irreparable injury by the wrongs complained of.

41. For that the said Bill of Complaints fails to allege any wrongdoing by this association.

42. For that the said Bill of Complaint fails to allege any wrongdoing by the members of this association or any of them.

43. For that no facts are alleged which show that this association or any of the members of this association * * * were under any duty to represent the complainants or any of them.

44. For that no facts are alleged to show any duty on any of the members of this association or any breach of any [fol. 42] duty by the members of this association.

45. For that it does not appear therefrom that the said agreements or contracts are in any way binding upon any of the complainants, or respondents, or either of them.

46. For that the remedy of complainants, if the defendant railroad has breached its contract or contracts with them, is at law by way of damages for breach of contract and for aught appearing from the said Bill of Complaint, said remedy would be entirely adequate.

47. For that no facts are alleged showing any right which equity will protect by injunction.

48. For that it is not alleged therein that the complainant, as a class were discriminated against by the said contract and it affirmatively appears therein that the classification made by said contract is reasonable.

49. For that the said Bill fails to allege that the alleged contract between the railroad and this association dated February 18, 1941, is illegal or unlawful in any respect.

50. It affirmatively appears therefrom that the said contract complained of by complainants was a contract which this respondent had a perfect right to negotiate, make, execute and to put into effect.

51. For that it affirmatively appears therefrom that complainant's remedy, if any, is by and through the administrative agencies set up by the said Railway Labor Act, and that the remedies therein prescribed are adequate.

52. For that it appears affirmatively therefrom that if complainants have any cause of action it is against the individuals who participated in the alleged wrong and not against the members of this association.

53. For that it affirmatively appears therefrom that there is no authority or warrant of law for the maintenance of this action against and in the name of this unincorporated organization or association.

54. For that the complainants ask equitable relief without submitting themselves to the jurisdiction of this Court and are not amenable to this Court and are not amenable to the process of this Court.

[fol. 43] 55. For that the record shows that this Court has no jurisdiction of the members of this association and has no power to render a decree affecting their individual rights.

56. For that it affirmatively appears that this Court has no jurisdiction to render a money decree against any of the members of this association or as against this association as such.

57. For that it affirmatively appears that the decree of this Court would be unenforceable as against the individual members of this association.

58. For that it affirmatively appears that this Court has no jurisdiction over the non-resident members of this association and cannot interfere with their freedom of contract.

59. For that this Court judicially knows that the members of this association are not liable for the tortuous acts of officers or agents of the association done without the authorization, approval or ratification of the said members.

60. For this Court judicially knows that the officers of this association have no power to bind the individual members of the said association in any way.

61. For that this association is not a proper party respondent to this Bill of Complaint.

62. For that this association is not a legal entity.

63. For that no affirmative relief can be granted against this unincorporated association on this cause of action.

64. For that the said Bill of Complaint is multifarious in that it seeks to combine in the one Bill of Complaint a great number of separate and individual causes of actions by various parties complainants, each standing on separate facts and circumstances and each demanding its own individual and separate class and degree of relief.

65. For that it affirmatively appears therefrom that the rights of the various parties complainants vary widely in the class and type of relief sought as well as the degree of the relief to which they are entitled and therefore the said Bill of Complaint is multifarious.

[fol. 44] 66. For that it is not shown thereby that the complainants or any of them will suffer irreparable injury by the putting into effect of the alleged contract.

67. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

68. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

II

And this respondent demurs to that aspect to said Bill of Complaint which prays a perpetual injunction and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the Bill of Complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that this Court has no sufficient jurisdiction to render a decree enjoining the members of this association from doing the things and matters complained of therein.

7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due process of law.

8. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

[fol. 45] 9. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

10. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

11. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

12. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

III

And this respondent demurs to that aspect of the Bill of Complaint which seeks a discovery and for grounds of said demurrer sets down and assigns the following:

1. For that there is no equity in the said aspect of the Bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that complainants show no right to a discovery.

4. For that the allegations of the said aspect of the bill are so vague, indefinite and uncertain and the prayer thereof, is so vague, indefinite and uncertain that this re-

spondent is not apprised of what it is called upon to defend or what it is called upon to produce in the way of a discovery.

5. For that the said allegations of the said aspect of the Bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the said complainants are seeking or what information they are entitled to.

6. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

7. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

8. For that no facts are alleged which show that the members of this association have the information, a discovery of which is prayed.

[fol. 46] 9. For that there is alleged no duty on the part of the members of this association to give the complainants, or any of them, a discovery of the information therein sought.

10. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified, or approved of such action.

IV

And this respondent demurs to that aspect of the Bill of Complaint which seeks restoration of plaintiff's and other negro locomotive firemen's rights and recognition of the same apart from the certain alleged agreement and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the Bill.

2. For that it affirmatively appears that the complainants have an adequate remedy at law.

3. For that it affirmatively appears that complainant's remedy, if any, is at law against the respondent railroad for damages for breach of contract.

4. For that the said relief therein prayed, if granted, would not be enforceable as against this respondent.

5. For that the relief therein prayed for, if granted, would not be enforceable as against the members of this association.

6. For that it affirmatively appears therefrom that the cause of action therein set up is not a cause of action for or upon which the plaintiff therein may maintain such an action against the members of this organization, or association.

7. For that it does not appear that the members of this organization or association participated in any way in the wrongful acts complained of therein or that they authorized, ratified or approved the said actions in any way.

7a. For that it affirmatively appears therefrom that this respondent cannot restore plaintiff's alleged position with the respondent railroad company and any decree rendered against this respondent would be effectual.

8. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill [fol. 47] of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

9. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

V

And this respondent demurs to that aspect of the Bill of Complaint which seeks an injunction against this respondent enjoining it and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen on the defendant railroad and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears from the allegations thereof that this association has a right under the said Rail-

way Labor Act to act as representative for all the locomotive firemen on the said defendant railroad.

4. For that this Court has no power to bind the members of this association by any decree rendered in this cause.

5. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such a cause of action against the members of this association or organization.

6. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

7. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

VI

And this respondent demurs to that aspect of the Bill of Complaint which seeks a declaratory judgment and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the Bill.

[fol. 48] 2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

5. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

6. For that it does not appear therefrom that there is any justiciable controversy between the complainants or any of them and the members of this association.

7. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

8. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of action or proceedings.

VII

And this respondent demurs to that aspect of the Bill of Complaint which seeks damages against this brotherhood and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the Bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it is not alleged therein that the members of this association participated in any way in, or in any way ratified, confirmed or approved the said action complained of.

5. For that it does not appear therefrom that the said contracts were negotiated or executed by agents, servants or employees of the members of this association acting [fol. 49] within the line and scope of their employment.

6. For that there is no authority or warrant of law for the awarding of damages to a class.

7. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

VIII

And this respondent demurs to that aspect of the bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the bill.

2. For that it affirmatively appears that the complainants have an adequate remedy at law.

3. For that it does not appear therefrom that the complainant has the authority to represent said class.

4. For that it does not appear therefrom that the interests of the class which the complainant seeks to represent are identical with his own.

5. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

6. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

7. For that there is no authority or warrant of law for the awarding of damages to a class.

8. For that there is no authority of warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

9. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this bill of complaint.

10. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

[fol. 50] Lange, Simpson, Brantley & Robinson, Solicitors for Respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association.

In Circuit Court of Jefferson County

Minute Entry of Submission of Demurrers and Amended Plea in Abatement—December 15, 1941

On this the 15th day of December, 1941, it is ordered by the Court that this cause be submitted for decree on the demurrers to Bill and amended Plea in Abatement.

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In Circuit Court of Jefferson County

Decree Sustaining Demurrers—January 21, 1942

This cause coming on to be heard was submitted for decree on the separate and several demurrers of respondents filed separately and severally to the Bill of Complaint:

And upon consideration it is held that the said demurrers are well taken. It is therefore Ordered, Adjudged and Decreed by the Court that said demurrer be and the same are hereby separately and severally sustained and the complainant is allowed thirty days from this date in which to amend.

Done and Ordered this the 21st day of January, 1942.

E. M. Creel, Circuit Judge, In Equity Sitting.

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In Circuit Court of Jefferson County

Decree Holding Plea in Abatement Insufficient—January 21, 1942

This Cause coming on to be heard is submitted for a ruling on the sufficiency of the Plea in Abatement as amended of respondent, Brotherhood of Locomotive Firemen and Enginemen, and the Court having considered and understood same is of the opinion that it is insufficient. It is, therefore,

Ordered, Adjudged and Decreed by the Court that said Plea in Abatement as last amended, of respondent, Brotherhood of Locomotive Firemen and Enginemen, is insufficient and said Plea in Abatement is hereby dismissed.

[fol. 51] Done and Ordered, this the 21st day of January, 1942.

E. M. Creel, Circuit Court, In Equity Sitting.

IN CIRCUIT COURT OF JEFFERSON COUNTY

ORDER EXTENDING TIME TO AMEND COMPLAINT—Filed February 20, 1942

It is Ordered, Adjudged and Decreed that the complainant be and he is hereby granted to and including March 3, 1942 to amend his Bill of Complaint.

Done and Ordered, this the 20th day of February, 1942.

J. Russell McElroy, Circuit Judge, In Equity Sitting.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDED COMPLAINT—Filed February 20, 1942

To the Honorable Judge or Judges of Said Court:

1. Your complainant shows unto your Honor that he is a resident of Jefferson County, Alabama, and is over twenty-one years of age; that respondent Louisville & Nashville Railroad Company is a corporation, incorporated in the State of Kentucky but engaged in interstate commerce by rail in the State of Alabama; that the respondent Brotherhood of Locomotive Firemen and Enginemen is a national unincorporated labor union whose membership is principally derived from locomotive firemen and enginemen employed on interstate railroads, including the defendant railroad. It is composed of a Grand Lodge and over nine hundred subordinate lodges throughout the country, including lodges, officers, and members resident in the State of Alabama and Jefferson County. By constitution, practice and ritual its membership is restricted to white men, all Negro firemen being excluded solely because of race.

2. Complainant is a negro fireman, aged 55, in perfect health, employed by the defendant railroad on the S. & N. A. seniority division, with seniority rights dating from February 4, 1910, and with an excellent service record. He brings this action personally in his own behalf and as a class suit representing and in behalf of all the other negro firemen on the defendant railroad, said other negro locomotive firemen constituting a class so numerous as to make it impracticable to bring them all before the Court, and there be- [fol. 52] ing common questions of law and fact, common

grievances and common relief sought as well as special relief sought.

3. Respondent railroad has employed plaintiff and plaintiff is working for it as a locomotive fireman under his individual contract of employment which embodies the standard terms of the collective bargaining agreement negotiated between the railroad and the defendant Brotherhood acting for all the locomotive firemen and hostlers on said railroad, and known as the Firemen and Hostlers Schedule issued March 1, 1929. By the terms of his contract of employment defendant railroad grants to plaintiff the security of permanent tenure in its service during good behaviour, and establishes seniority rights on each division with provision (Art. 26) that the oldest firemen in road service will have the preference of runs and promotion on the seniority territory to which assigned, when competent and worthy. Plaintiff states that at all times material herein he was a fireman in road service, wholly competent and worthy for the service to which his seniority entitled him to, and a faithful, loyal and efficient fireman in all respects. Plaintiff's employment status is a vested property right and his seniority rights under said status have a special value in view of his advanced years and length of service with the defendant railroad.

4. At all times material herein prior to April 7, 1944, plaintiff was employed in the "pool" of locomotive firemen on the defendant railroad's S. & N. A. seniority division. By the terms of his contract embodying the standard provisions of the collective agreement aforesaid the mileage earnings of firemen in the pool have a minimum guarantee, which amounted for plaintiff on an average between 4,100 to 4,500 miles per month at the rate of $5.75 or $5.51 per hundred miles according to the class of engine he was firing. Plaintiff's monthly pay check while working in the "pool" was about $225.00, after deducting $7.65 for insurance, $2.60 for hospital fund, and $3.00 per $100.00 for retirement. By virtue of his seniority he was holding down one of the best assignments in said seniority district (the S. & N. A. Division constituting in itself a seniority territory within the meaning of Article 26 aforesaid.) Firemen are eligible to "bid" for placement in the "pool" according to their relative seniority except as noted below.

[fol. 53] 5. The vast majority of the locomotive firemen employed by the defendant railroad are white and members of the defendant Brotherhood; and all the white firemen who at any time material herein have been or are now members of the "pool" on the S. & N. A. seniority division are members of the defendant Brotherhood. By force of having a majority of the entire craft or class of locomotive firemen on the defendant railroad the white members of the Brotherhood since the passage of the Federal Railway Labor Act of June 21, 1934 (U. S. Code, Title 45, Ch. 8) have designated said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on the defendant railroad, including the minority negro locomotive firemen which the Brotherhood excludes from membership solely on account of race or color. By virtue of said Railway Labor Act the minority negro locomotive firemen, including plaintiff, have been compelled to accept the defendant Brotherhood as their exclusive bargaining agent and grievance representative in dealings with the defendant railroad; and they have so accepted defendant Brotherhood within the limitations of the lawful exercise of its powers.

6. Respondent Brotherhood is herein sued in its own right as bargaining representative of plaintiff and the other minority negro firemen under said Railway Labor Act, and further as representative of all the white member firemen employed on the defendant railroad, particularly the white member firemen who are employed in the "pool" on the S. & N. A. seniority division.

7. By the terms of the covering contract of March 1, 1939 aforesaid (which forms part of plaintiff's employment contract) the right to make and interpret contracts, rules, rates and working conditions is vested in the regularly constituted Committee of the Brotherhood and the general officials of the railroad; local officials are forbidden to enter into local agreements with local committee or with any individual fireman or hostler in conflict with said covering contract without the approval of the general officials of the railroad and the general chairman of the Brotherhood; and the life of the contract is expressly made subject to 30 days notice by either the railroad or the Brotherhood. By virtue of their membership and further

by virtue of their nomination of the Brotherhood as bargaining agent under the Railway Labor Act, the white firemen, including the white firemen in the "pool" on the S. & N. A. seniority division have expressly made the Brotherhood their representative for all matters affecting con-[fol. 54] tracts, rules, rates and working conditions.

8. The white firemen members of the defendant Brotherhood not only constitute a majority of the firemen on the defendant Railroad but also constitute a majority of the firemen on each of the railroads listed in the Notice dated March 28, 1940 to the Southeastern Carriers Conference attached to this amended complaint as "Exhibit A"; and on each said railroad have designated and established said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on said railroad, including the minority non-member negro firemen. The Brotherhood has asserted to act under color of said Railway Labor Act not only in the matter of adjusting general conditions of work but also in handling and regulating all rules, rates of pay, contract terms and working conditions of the individual employment contracts between the carrier and the individual fireman; and has asserted exclusive and unrestricted dominion over the individual contract of the negro firemen on the defendant railroad, including plaintiff's individual contract of employment.

9. Defendant Brotherhood has not exercised its powers of representation under the Railway Labor Act aforesaid loyally, impartially and in good faith with respect to the minority non-member negro firemen; but has constantly discriminated against them in an effort to obtain for its white member firemen a monopoly of employment on all railroads, including defendant railroad, and gradually to eliminate the negro firemen from employment thereon. To that end it has over a period of fifteen years secretly negotiated with said railroads, including the defendant railroad, a series of agreements and modifications of agreements placing *every* increasing strictures on the employment of negro firemen and curtailing and destroying their seniority rights and other vested rights under their individual employment contracts, to the preferential advantage of their own white member locomotive firemen. As a direct consequence of the Brotherhood's persecution the employment

of negro firemen on all railroads, including the defendant railroad, has greatly declined, their job assignments have become less frequent and more irregular, their work more hazardous and burdensome both individually, and as a class as compared with the employment, job assignments and work of the white member locomotive firemen.

10. Defendant Brotherhood in functioning as sole and exclusive bargaining agent and grievance representative under the Railway Labor Act, particularly sections 151a and 152, Title 45, U. S. Code of the entire craft or class of fire-[fol. 55] men on the defendant railroad, at all times owes a statutory and fiduciary duty to each individual locomotive fireman, including plaintiff and the other negro non-member locomotive firemen, to represent him loyally and in good faith, not to seek a monopoly or other special advantage for its own members against the non-members, to stand impartial between all the firemen, to make full disclosure of all negotiations and other proposed actions affecting the individual fireman's rate of pay, rules and working conditions, to give reasonable notice, opportunity to be heard, and a chance to vote to the individual fireman on any action proposed, and full and prompt report on all action taken affecting his interests, and generally to conform to and respect the rules of law and standards of conduct governing the relationship of principal and agent as the statutory agent of said individual fireman by designation of the majority of the craft or class of firemen under said Railway Labor Act. Nevertheless in flagrant violation of its duties in the premises so far as plaintiff and the other negro non-member locomotive firemen on defendant and the other railroads are concerned, the defendant Brotherhood has persistently been unfaithful to its fiduciary duty and agency relationship, has been and is now disloyal to him and them, has sought to force him and them out of employment and destroy their respective seniority rights in an effort to obtain for its own members a monopoly of employment, or failing that the most favored job assignments and best conditions of work regardless of merit or seniority. It has refused and still refuses to notify plaintiff and the negro non-member firemen of proposed actions affecting his or their interests, to report its deeds done as his or their bargaining representative or to handle his or their grievances, and has refused and still refuses to give

him or them fair, honest and faithful representation under said Railway Labor Act.

11. At all times material herein all the responsible officials of the defendant railroad, specifically the Director of Personnel, a general officer, and his staff, have been and are fully acquainted with the attitude and attempts of the Brotherhood to obtain a monopoly of employment and most favored conditions for its own white member firemen against plaintiff and the minority non-member negro firemen.

[fol. 56] 12. In execution of its discriminatory scheme aforesaid under date of March 28, 1940, the defendant Brotherhood without notice to plaintiff or the other negro firemen, or without giving them a chance to protest or otherwise protect themselves, served on the Southeastern Carriers, including defendant railroad, a thirty — notice to amend all existing agreements and employment contracts of the firemen on said roads, including the individual contracts of plaintiff and the other negro non-member firemen, in such a way as to destroy their vested seniority rights by providing that only promotable men would be employed as firemen on other than steam power, that when new runs or jobs should be established in any service only promotable firemen would be assigned, or the same in case of permanent vacancies or established runs or jobs. (See further "Exhibit A" hereto which is prayed to be read in full herewith). According to existing railroad practice promotable men means white men; negroes being known as non-promotable men and being the only group of firemen so designated. All the general officials of the defendant railroad knew that said notice proposed a modification of existing contracts prejudicial to the existing individual contracts between the defendant railroad and its negro firemen, including plaintiff; knew the motive of the defendant Brotherhood was to try to drive the negro locomotive firemen out of employment and to take away the benefits of their vested seniority rights.

13. Nevertheless in spite of such knowledge of the purpose and motive of the defendant Brotherhood, without notice to the plaintiff or the other negro locomotive firemen employed by it, defendant railroad acting by and through its general officers who were then and there acting

in the course of and within the scope of their employment and in prosecution of the business of the defendant railroad did conspire with the defendant Brotherhood, and well knowing that the effect of said agreement would be to destroy the vested seniority rights of plaintiff and the other minority negro firemen or seriously curtail the exercise of the same, did execute with said Brotherhood the so-called "Washington Agreement" dated February 18, 1941, effective February 22, 1941; and the modification of said agreement dated Louisville, Kentucky May 12, 1941. (Copies of said Agreement and modification are already attached to the original complaint herein filed, and now designated as Exhibits "B" and "C" respectively to this [fol. 57] amended complaint are incorporated herein by reference and prayed to be read in full herewith).

12. By the terms of said "Washington Agreement" the proportion of non-promotable firemen on other than steam power shall not exceed fifty per cent in each class of service; but even then the agreement did not sanction the employment of non-promotable men on any seniority district on which non-promotable men were not employed at the date of the agreement; and further until such percentage should be reached all new runs and all vacancies created by death, dismissal, resignation or disqualification should be filled by promotable men.

13. In addition the agreement provided that the representatives of the employees did not waive and were not to be considered prejudiced in the right to request further agreements or modifications of agreements still more narrowly restricting the employment of helpers on other than steam power on any railroad to promotable men, meaning white men to the exclusion of negroes.

14. Although the "Washington Agreement" applied only to firemen and helpers on power other than steam power, yet the defendant Brotherhood acting through its General Chairman for the defendant railroad who was then and there purporting to act within the scope and course of his employment as bargaining agent under the Railway Labor Act for all the firemen on the defendant railroad including plaintiff and the other negro firemen, and the defendant railroad acting through its general officers the Director of Personnel and Assistant Directors of Personnel

who were then and there purporting to execute the business of the railroad and were acting within the scope and course of their employment, did broaden the scope of said Agreement and did modify and extend the same to include all power and to restrict the seniority rights of plaintiff and the other negro firemen on steam locomotives; and they did confederate together to destroy and curtail plaintiff's vested seniority rights, as more fully evidenced in detail by the terms of said modification (See Exhibit "C").

15. Although the negro firemen constitute the minority group of firemen on the entire defendant railroad system, they constitute the majority group of the S. & N. A. seniority division to which plaintiff is assigned and in which he has his vested seniority rights. The negro firemen constitute [fol. 58] about eighty per cent or more of the total firemen on said division; and up to the making of the "Agreement" and modification aforesaid had exercised their vested seniority rights without discrimination.

16. Under existing railroad practice on the defendant railroad when a train is taken out of service which has been pulled by a locomotive fired by a fireman taken from the "pool" the same is considered as changing the "pool" to the extent of placing the positions in the same up for competitive bidding by the firemen on the basis of seniority.

17. Shortly before April 7, 1941, the defendant railroad took a train out of service which was pulled by a locomotive fired by a fireman taken from the "pool", and as a consequence the jobs in the "pool" were advertised for bids. By virtue of his seniority plaintiff was entitled to one of the "pool" jobs but because of his race, and solely because of his race, he was without cause and in spite of the fact that by seniority, competence and worth he was entitled to the same, he was denied a job in the "pool" on the strength of said "Agreement" and modification. By such action the defendant railroad violated its employment contract with him and breached his seniority rights. In his place the defendant Brotherhood and the defendant railroad caused a white fireman junior to him and a member of the Brotherhood to be placed in the "pool", in pursuance of the conspiracy aforesaid and the campaign of the Brotherhood to seek preferential advantages for its own members at the expense of the non-member negro firemen.

18. In consequence of the wrongful acts of the defendants plaintiff's earnings have been reduced over $50.00 per month, his work assignments have been more burdensome and hazardous, his hours of employment have been longer and his enforced absence from home more prolonged. His vested retirement rights under the Railway Retirement Act of June 24, 1937 (U. S. Code, Title 45, Ch. 9) have been seriously impaired and will be irreparably damaged unless this Court grants relief.

19. Plaintiff has exhausted his remedies within the Brotherhood and the railroad to the point where he is lawfully entitled to seek relief at the hands of this Court. He has appealed to the highest operating officer of the defendant railroad with jurisdiction in the premises, and to the general chairman of the defendant Brotherhood representing, or [fol. 59] supposed to represent and employed to represent under the Railway Labor Act, all the firemen on the defendant railroad. Nevertheless he has been denied all relief by the Railroad and the Brotherhood, and said wrongs have continued, now exist and will continue to exist and grow worse unless restrained by this Court. Legal relief by way of damages are inadequate for full redress of his wrongs suffered. The seniority rights of the other negro firemen on the defendant railroad have been similarly curtailed or threatened by defendant railroad and defendant Brotherhood under said "Agreement" and modification.

Wherefore Premises Considered, the defendants being already before this Court by process lawfully served upon them plaintiff prays that they be required to plead, answer or demur hereto within the time prescribed by law, and further prays that:

1. He be granted a permanent injunction against each defendant perpetually enjoining them and each of them from enforcing or otherwise recognizing the said "Agreement" or modification thereof:

2. Discovery by the Brotherhood of all agreements and negotiations undertaken by it with the defendant railroad since the enactment of the Railway Labor Act of 1934 in which it purported to act as the exclusive bargaining agent for all the locomotive firemen on the defendant railroad under said Act, which have resulted in its occupying a hostile position or having conflicting interests with plaintiff

and the other non-member negro firemen regarding rates of pay, rules or working conditions;

3. Restoration of plaintiff's and other negro firemen's seniority rights and recognition of the same apart and independent of said "Agreement" and modification thereof;

4. A permanent injunction against the defendant Brotherhood, its officers, subordinate lodges, members, agents, or attorneys perpetually enjoining them and each of them from purporting to act as representative of plaintiff or the other negro firemen on the defendant railroad, so long as it or any of them refuse to give plaintiff and the other negro firemen notice, opportunity to be heard and a vote on all matters affecting them individually or in common with the other locomotive firemen on defendant railroad as a craft or class.

[fol. 60] 5. A decree binding all parties and their privies and those represented herein, settling, declaring and defining the rights, interests and other legal relations of the parties in and to and by reasons of the matters herein controverted;

6. Damages against the Brotherhood for loss of wages, destruction of vested seniority preference rights, and breach of its fiduciary and statutory duty as exclusive bargaining agent and grievance representative under the Railway Labor Act and the other injuries set forth in the sum of Fifty Thousand ($50,000.00) dollars in favor of plaintiff;

7. Relief for the other negro locomotive firemen on the defendant railroad as a class in the same manner as prayed for by plaintiff individually, so far as their interests may appear;

8. General relief.

Arthur D. Shores, 1630 Fourth Ave., N. Birmingham; J. T. Settle, 145 Beale Ave., Memphis, Tenn.; Charles H. Houston, Joseph C. Waddy, 615 F. Street, N. W., Washington, D. C.; By Charles H. Houston, Attorneys for Plaintiff.

CERTIFICATE OF SERVICE

I, Charles H. Houston, do hereby certify that prior to filing this amended Complaint and at the same time the original was forwarded to the Clerk of the Court, I mailed a

copy, postage prepaid, to Lange, Simpson, Brantley & Robinson, Esquires, Attorneys for the defendant Brotherhood, Nelson Building, Birmingham, Alabama; and to, Gibson & Gibson, Esquires, White Gibson, Esquire, Chas. H. Eyster, Attorneys for the defendant Railroad, Birmingham, Alabama.

Washington, D. C., February 19, 1942.

Charles H. Houston.

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[fol. 61] EXHIBIT "A" TO AMENDED COMPLAINT

Brotherhood of Locomotive Firemen and Enginemen

General Grievance Committee

Railway,
March 28, 1940.

Mr. —— ——, ——.

DEAR SIR:

This is to advise that the employees of the Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen Enginemen, have approved the presentation of request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur or established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen or helpers on other than steam power or those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor

Act, kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

The same request as this date being presented on the following railroads:

Atlantic Coast Line
Jacksonville Terminal
Atlanta Joint Terminal
Atlanta & West Point
Western Railroad of Ala.
Central of Georgia
Louisiana and Arkansas
Mobile and Ohio, Columbus & Greenville
Norfolk & Postmouth Belt
Norfolk & Southern
Norfolk & Western
[fol. 62] Frankfort & Cincinnati
Georgia Railroad
Georgia & Florida
Gulf, Mobile & Northern
Louisville & Nashville
Memphis Union Station Co.
Seaboard Airline
Southern Railroad System
St. Louis-San Francisco
Tennessee Central

It is our request that all lines or division of railway controlled by the Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for purpose of discussing the proposal. In event settlement is not reached in conference it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly, (Signed) General Chairman.

[fol. 63] In Circuit Court of Jefferson County

Demurrer of L. & N. R. R. Co. Refiled to Bill as Last Amended—Filed March 10, 1942

Comes the respondent, Louisville & Nashville Railroad Company, a corporation, and refiles its demurrer heretofore filed to complainant's original bill of complaint, so that said demurrer shall be filed against complainant's bill of complaint as last amended.

Chas. H. Eyster, and Gibson and Gibson, Solicitors for respondent, Louisville and Nashville Railroad Company, a corporation. By White E. Gibson.

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In Circuit Court of Jefferson County

Demurrer of Brotherhood to Amended Bill—Filed March 17, 1942

I

Comes the Brotherhood of Locomotive Firemen and Enginemen, one of the respondents in the above cause, and demurs to the amended bill of complaint in this cause presented against it as a whole, and as grounds of said demurrer, sets down and assigns the following, separately and severally:

1. For that it does not appear therefrom that the individuals who negotiated the alleged contracts attached as exhibits to said amended bill of complaint were agents, servants or employees of the members of this association generally, and were acting in the line and scope of their employment as such.

2. For that it does not appear therefrom with sufficient certainly that the individuals who negotiated and executed the alleged contracts were, at the time, acting within the line and scope of their authority as agents, servants or employees of this association.

3. For that it does not appear therefrom with sufficient certainty that the individuals who negotiated and executed said contracts were, at the time, acting as agents, servants or employees of the members of this association within the line and scope of their authority as such.

4. For that there does not appear therefrom any reason why this association or the members thereof should be held accountable for the actions of the statutory representatives [fol. 64] under the Railway Labor Act.

5. For that the allegation that complainant's contract embodied the standard provisions of the Firemen's and Hostlers' Schedule issued March 1, 1929, is a conclusion of the pleader.

6. For that the allegation that the complainant's employment status is a vested property right is a conclusion of the pleader.

7. For that the allegation that the white members of the Brotherhood have designated said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on defendant railroad is a conclusion of the pleader.

8. For that the averments thereof are so vague, indefinite and uncertain that this respondent is not sufficiently apprised as to what actions on its part are complained of by the various parties complainant.

9. For that it does not appear with sufficient certainty who was the designated bargaining agent for the entire craft or class under the Railway Labor Act.

10. For that it does not appear that this association has ever been certified as the exclusive bargaining agent under the Railway Labor Act.

11. There is no equity in the amended bill.

12. It affirmatively appears therefrom that this action is not maintainable against the members of this association generally.

13. For that it does not appear therefrom that this cause of action is a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

14. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

15. For that the amended bill of complaint does not allege that the persons whose names appear on Exhibit 1 and 2 of the original bill of complaint as signing on behalf of [fol. 65] the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by the members of this association to execute the said document or that the execution of said document was ratified by the members of this association.

16. For that it affirmatively appears therefrom that the execution of the document constituting Exhibits 1 and 2 of said amended bill of complaint were neither authorized nor ratified by the members of this association.

17. For that it does not appear therefrom that the documents constituting Exhibits 1 and 2 of the said amended bill of complaint were executed for or on behalf of the members of this association.

18. For that it affirmatively appears therefrom that the documents constituting Exhibits 1 and 2 of said amended bill of complaint were not executed for or on behalf of the members of this association.

19. For the allegation that complainant is employed by the defendant, Louisville & Nashville Railroad Company, on the S. & N. A. Division, with seniority rights as a firemen is a conclusion of the pleader.

20. For that the averments of the amended bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

21. For that there are no facts alleged which show that complainant was entitled to seniority rights, nor is there any averment as to what seniority rights plaintiff was entitled.

22. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

23. For that it affirmatively appears therefrom that the complainant has no right to maintain this amended bill for behalf of the other negro firemen.

[fol. 66] 24. For that it appears therefrom that the measure and extent of complainant's damages as well as the

class of complainant's damages is materially different from that of others constituting the class which he seeks to represent.

25. For that it does not appear therefrom that the complainant has the consent or authority of the class which he seeks to represent.

26. For that it does not appear therefrom that the other members of the class which complainant seeks to represent have seniority rights or that their rights have been affected in any way by the action complained of.

27. For that the said amended bill of complaint shows that said complainant is asking the benefits of the alleged contracts between the railroad and the locomotive firemen and hostler's schedules issued on March 1, 1929, and is unwilling to abide by the terms, provisions and conditions of the said alleged schedule or contract.

28. For that it does not appear therefrom that complainant, or any of the class which he seeks to represent, have sustained any injuries or damages as a result of the action complained of.

29. For that there are not alleged therein any facts which make the alleged contract constituting Exhibit 1 and 2 of said amended bill of complaint illegal, unconscionable or unfair.

30. For that it affirmatively appears therefrom that both parties respondent were free contracting agencies and had right to make and enter into the contracts set out as Exhibits to the amended bill.

31. For that the relief prayed for in the amended bill would be an undue interference with the rights of the parties respondent to contract as they have a right to do.

32. For that there is a misjoinder of parties complainant in that complainant seeks to combine a personal claim for damages with a claim of the negro firemen of the class of equitable relief.

33. For that the interest and injuries of the negro firemen do not sufficiently appear to enable the Court to adjudicate their rights in the premises.

[fol. 67] 34. For that an action for damages can not be brought on behalf of a class.

35. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

36. For that no reason is alleged why this association can not execute any contract if so desired for the benefit of its members.

37. For that said amended bill fails to allege or to set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

38. For that said amended bill of complaint shows that complainant is seeking to obtain the benefits of an alleged contract between the defendant company and this association as though he were a member of the said brotherhood or association; without the averment that he is a member of said brotherhood or association.

39. For that said amended bill fails to allege what the alleged conspiracy was between the said railroad and this respondent.

40. For that said amended bill does not allege facts sustaining the averment of conspiracy between the railroad and this respondent.

41. For that the allegation of the conspiracy between the railroad and this respondent is a conclusion of the pleader.

42. For that a corporation is incapable of entering into a conspiracy.

43. For that a voluntary association is incapable of entering into a conspiracy.

44. For that it is not alleged that any of the members of this association entered into a conspiracy or that they authorized, ratified or condoned a conspiracy.

45. For aught that appears therefrom, the members of this association had no knowledge and were not parties in any way to the said contracts.

46. For that it is not alleged that the persons whose names appear on the said contract or any of them were

agents, servants of employees of the members of this association, acting within the line, scope and course of their employment as such.

47. For that the allegations that this association was acting as exclusive bargaining agent under the Railway Labor Act of June 21, 1934, is a conclusion of the pleader and no [fol. 68] facts are alleged to support the said concusion.

48. For that the complainant has an adequate remedy at law.

49. For that the said amended bill of complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the respondent railroad company by way of damages for breach of contract.

50. For that there are no facts alleged showing that plaintiff will suffer irreparable injury by the wrongs complained of.

51. For that the said amended bill of complaint fails to allege any wrong doing by this association.

52. For that the said amended bill of complaint fails to allege any wrong doing by the members of this association or any of them.

53. For that no facts are alleged which show that this association or any of the members of this association were under any duty to represent the complainants or any of them.

54. For that no facts are alleged to show any duty on any of the members of this association or any breach of any duty by the members of this association.

55. For that it does not appear therefrom that the said agreements or contracts are in any way binding upon any of the complainants or respondents or either of them.

56. For that the remedy of complainants, if the defendant railroad has breached its contract or contracts with them, is at law by way of damages for breach of contract, and for aught appearing from the said amended bill of complaint, said remedy would be entirely adequate.

57. For that no facts are alleged showing any right which equity will protect by injunction.

58. For that it is not alleged therein that the complainant, as a class, was discriminated against by the said contract and it affirmatively appears therein that the classification made by said contract is reasonable.

59. For that the said amended bill fails to allege that the alleged contract between the railroad and this association dated February 18, 1941, is illegal or unlawful in any respect.

[fol. 69] 60. It affirmatively appears therefrom that the said contract complained of by complainants was a contract which this respondent had a perfect right to negotiate, make, execute and put into effect.

61. For that it affirmatively appears therefrom that complainant's remedy, if any, is by and through the administrative agencies set up by the said Railway Labor Act, and that the remedies therein prescribed are adequate.

62. For that it appears affirmatively therefrom that if complainants have any cause of action it is against the individuals who participated in the alleged wrong and not against the members of this association.

63. For that it affirmatiyely appears therefrom that there is no authority or warrant of law for the maintenance of this action against and in the name of this unincorporated organization or association.

64. For that the complainants ask equitable relief without submitting themselves to the jurisdiction of this Court and are not amenable to this Court and are not amenable to the process of this Court.

65. For that the record shows that this Court has no jurisdiction of the members of this association and has no power to render a decree affecting their individual rights.

66. For that it affirmatively appears that this Court has no jurisdiction to render a money decree against any of the members of this association or as against this association as such.

67. For that it affirmatively appears that the decree of this Court would be unenforceable as against the individual members of this association.

68. For that it affirmatively appears that this Court has no jurisdiction over the non-resident members of this association and can not interfere with their freedom of contract.

[fol. 70] 69. For that this Court judicially knows that the members of this association are not liable for the tortuous acts of officers or agents of the association done without the authorization, approval or ratification of the said members.

70. For this Court judicially knows that the officers of this association have no power to bind the individual members of the said association in any way.

71. For that this association is not a proper party respondent to this amended bill of complaint.

72. For that this association is not a legal entity.

73. For that no affirmative relief can be granted against this unincorporated association on this cause of action.

74. For that the said amended bill of complaint is multifarious in that it seeks to combine in the one amended bill of complaint a great number of separate and individual causes of actions by various parties complainants, each standing on separate facts and circumstances and each demanding on its own individual and separate class and degree of relief.

75. For that it affirmatively appears therefrom that the rights of the various parties complainants vary widely in the class and type of relief sought as well as the degree of the relief to which they are entitled and therefore, the said amended bill of complaint is multifarious.

76. For that it *now* shown thereby that the complainants or any of them will suffer irreparable injury by the putting into effect of the alleged contract.

77. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this bill of complaint.

78. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

[fol. 71] II

And this respondent demurs to that aspect of said amended bill of complaint which prays a perpetual injunction and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the amended bill of complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that this Court has no sufficient jurisdiction to render a decree enjoining the members of this association from doing the things and matters complained of therein.

7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due processes of law.

8. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

9. For that the same is not a cause of action for or upon which the complainant therein may maintain such action against the members of this organization or association.

10. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

11. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and

who are indispensable parties (to) this amended bill of complaint.

12. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

[fol. 72] 13. For that the same amounts to a bill for specific performance.

14. For that under the alleged contract, the breach of which complainant seeks to enjoin, the complainants would not receive anything unique in value, but would receive only money.

III

And this respondent demurs to that aspect of the amended bill of complaint which seeks a discovery, and for grounds of said demurrer sets down and assigns the following:

1. For that the said amended bill of complaint is not sworn to.

2. For that the allegations thereof are not made under oath.

3. For that there is no equity in the said aspect of the amended bill.

4. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

5. For that complainants show no right to a discovery.

6. For that the allegations of the said aspect of the bill as amended are so vague, indefinite and uncertain, and the prayer thereof is so vague, indefinite and uncertain that this respondent is not apprised of what it is called upon to defend or what it is called upon to produce in the way of a discovery.

7. For that the said allegations of the said aspect of the amended bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the said complainants are seeking or what information they are entitled to.

8. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

9. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

10. For that no facts are alleged which show that the members of this association have the information, a discovery of which is prayed.

11. For that there is alleged no duty on the part of the members of this association to give the complainants, or [fol. 73] any of them, a discovery of the information therein sought.

12. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

IV

And this respondent demurs to that aspect of the amended bill of complaint which seeks restoration of plaintiff's and other negro locomotive firemen's rights and recognition of the same apart from the certain alleged agreement, and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the bill.

2. For that it affirmatively appears that the complainants have an adequate remedy at law.

3. For that it affirmatively appears that complainant's remedy, if any, is at law against the respondent railroad for damages for breach of contract.

4. For that the said relief therein prayed, if granted, would not be enforceable as against this respondent.

5. For that the relief therein prayed for, if granted, would not be enforceable as against the members of this association.

6. For that it affirmatively appears therefrom that the cause of action therein set up is not a cause of action for or upon which the plaintiff therein may maintain such an action against the members of this organization or association.

7. For that it does not appear that the members of this organization or association participated in any way in the wrongful acts complained of therein or that they authorized, ratified or approved the said actions in any way.

8. For that it affirmatively appears therefrom that this respondent can not restore plaintiff's alleged position with the respondent railroad company and any decree rendered against this respondent would be effectual.

[fol. 74] 9. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

10. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

11. For that the same seeks specific performance of an alleged obligation for the payment of money.

12. For that the same seeks specific performance of a contract by the alleged terms of which the complainant would receive only money.

13. For that it is not alleged that complainant would receive anything of uniqure (unique) value in the enforcing of the alleged contract.

14. For that the complainants pray for specific performance without offering to perform themselves.

15. For that the performance by either complainants or respondents would be unenforceable.

V

And this respondent demurs to that aspect of the amended bill of complaint which seeks an injunction against this respondent enjoining it and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen on the defendant railroad, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears from the allegations thereof that this association has a right under the said Railway Labor Act to act as representative for all the locomotive firemen on the said defendant railroad.

[fol. 75] 4. For that this Court has no power to bind the members of this association by any decree rendered in this cause.

5. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such a cause of action against the members of this association or organization.

6. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

7. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

*VI*

And this respondent demurs to that aspect of the amended bill of complaint which seeks a declaratory judgment, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that there is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

5. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

6. For that it does not appear therefrom that there is any justiciable controversy between the complainants or any of them and the members of this association.

7. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

[fol. 76] 8. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of action or proceedings.

*VII*

And this respondent demurs to that aspect of the amended bill of complaint which seeks damages against this Brotherhood, and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it is not alleged therein that the members of this association participated in any way in, or in any way ratified, confirmed or approved the said action complained of.

5. For that it does not appear therefrom that the said contracts were negotiated or executed by agents, servants, or employees of the members of this association acting within the line and scope of their employment.

6. For that there is no authority or warrant of law for the awarding of damages to a class.

7. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

*VIII*

And this respondent demurs to that aspect of the amended bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer, sets down and assigns the following:

1. For that it appears therefrom that the interests of the negro firemen on the S. and N. A. Seniority Division of the L. and N. Railroad Company are different in kind, class and [fol. 77] degree from the negroes on the other divisions of said railroad.

2. For aught appearing therefrom, many of the parties sought to be made parties complainant will not be injuriously affected by the action complained of.

3. For that it does not appear that any of the parties who are sought to be made parties complainant with the exception of complainant Steele have suffered any injury, damages or invasion of right.

4. For that it does not appear that the contracts of the various parties sought to be made complainants embody the terms of the said Firemen's and Hostlers' Schedule.

5. For that it does not appear therefrom that the various parties complainant have any seniority rights.

6. For that it does not appear therefrom that the various parties complainant are entitled to any seniority rights or privileges or preference of runs.

7. For that it does not appear therefrom that the various parties complainant have any vested property right which has been invaded by the actions complained of.

8. For that there is no equity in the said aspect of the amended bill.

9. For that it affirmatively appears that the complainants have an adequate remedy at law.

10. For that it does not appear therefrom that the complainant has the authority to represent said class.

11. For that it does not appear therefrom that the interests of the class which the complainant seeks to represent are identical with his own.

12. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

[fol. 78] 13. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

14. For that there is no authority or warrant of law for the awarding of damages to a class.

15. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

16. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

17. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association.

IN CIRCUIT COURT OF JEFFERSON COUNTY.

MINUTE, ENTRY ON SUBMISSION OF DEMURRERS—April 15, 1942

On this the 15th day of April, 1942 it is ordered by the Court that this cause be submitted for decree on demurrers to amended bill.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDMENT TO AMENDED BILL OF COMPLAINT—Filed June 15, 1942

To the Honorable Judge of Said Court:

Comes the complainant in the above styled case and with leave of the Court first had and obtained, amends the Amended Bill of Complaint as follows:

1. At the end of the first sentence in paragraph 3, insert the following:

"A copy of said Schedule entitled 'Agreement between the Louisville & Nashville Railroad and its Locomotive [fol. 79] Firemen and Hostlers,' issued March 1, 1929, is herewith filed as Exhibit AA to this Amended Complaint, and is prayed to be read in full as a part hereof."

2. At the end of the second sentence in paragraph 5, insert the following:

"Plaintiff does not know the method by which said white firemen designated said Brotherhood as the exclusive bargaining agent and grievance representative under the Railway Labor Act for the entire craft of firemen on the defendant Railroad, has no means of ascertaining and no way of procuring the information since the proceedings of the Brotherhood are secret; but he does aver that in fact the Brotherhood with the knowledge, acquiescence, approval and ratification of said white firemen has been acting as the exclusive bargaining agent and grievance representative as aforesaid."

3. At the end of paragraph 7, insert the following:

"The firemen constituting said 'pool' are constantly changing due to promotions, shifts in assignments, new

jobs, and other factors of railroad operation, but all the white firemen who have been in the 'pool' at any time material herein, or who are now in the 'pool' or who may be eligible for the 'pool' are members of the defendant Brotherhood, take their rights by virtue of its action as exclusive bargaining agent aforesaid, and have expressly made said Brotherhood their representative for all matters affecting contracts, rules, rates and working conditions, and are fully and fairly represented by said Brotherhood in this proceeding."

4. At the end of paragraph 11, insert the following:

"The officers who made and served the notice (Exhibit A), who negotiated and executed said Washington Agreement and Modification thereof (Exhibits B and C) were all, and each, duly authorized by said Brotherhood so to do and were acting in the premises in the course and scope of their employment and for the interest and benefit of the Brotherhood, its members at large, and specifically the white firemen members on the defendant Railroad and in the 'pool' on the S. & N. A. Division. But for the reason that the proceedings of the Brotherhood are secret plaintiff is without knowledge or information or means of obtaining information concerning the details of such authorization, but states that in fact said notice, Agreement and Modification have been approved by all the white firemen on the defend- [fol. 80] ant Railroad and they have claimed all the rights and benefits of the same."

5. At the end of paragraph 19, and paragraph 20 as follows:

"20. Plaintiff at all times on and after April 7, 1941, has been ready, able and willing to perform faithfully and efficiently all duties as a fireman in said 'pool' or elsewhere as his seniority rights have entitled him to, and is still ready, able and willing, has so tendered himself to the defendant Railroad and still tenders himself and will ever tender himself; but he has been prevented wrongfully from exercising his seniority rights and performing his said duties by virtue of the Agreement and Modification aforesaid."

6. At the end of the amended complaint, add the jurat hereto attached: Exhibit "AA" is an agreement between

the Louisville & Nashville Railroad and its Locomotive Firemen and Hostlers, etc., the original of which is included in a supplemental record and sent down along with the original record.

Charles H. Houston, Arthur D. Shores, Attorneys for plaintiff.

Certificate of Service

I, Arthur D. Shores, hereby certify that prior to presenting these proposed amendments to the Court I served a copy of same on counsel for each defendant in open Court.

Arthur D. Shores, Attorney for plaintiff.

*Duly sworn to by Bester William Steele. Jurat omitted in printing.*

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[fol. 81] In Circuit Court of Jefferson County

Amendment to Demurrer of Brotherhood—Filed June 15, 1942

Comes the Respondent, Brotherhood of Locomotive Firemen and Enginemen, and amends its demurrer to the amended bill of complaint as a whole by adding thereto the following grounds, separately and severally:

79. For that the allegation that all the white firemen who have been in the pool at any time material herein or who are now in the pool, or who may be eligible for the pool, are fully and fairly represented by said brotherhood in this proceeding, is a conclusion of the pleader.

80. For that the allegation that said notice, agreement and modification have been approved by all the white firemen on the defendant railroad is not sufficient to charge that said firemen actually participated in the wrongful acts charged or ratified same.

81. For that the approval by any of the white firemen of the acts complained of is not sufficient to impose upon them legal liability.

82. For that it affirmatively appears from the bill of complaint, as last amended, and the exhibits thereto that the rates, rules and working conditions as provided by the

Locomotive Firemen and Hostlers' Schedule was subject to 30 days' written notice by either party.

83. For that it does not appear that complainant's respective contracts of employment have been breached; but it affirmatively appears that the defendant railroad company was within its legal rights in modifying the complainant's respective contracts.

And this respondent amends its demurrer to that aspect of the amended complaint which prays a perpetual injunction by adding thereto the following separate and several grounds:

15. For that said relief, if granted, would amount to a decree of specific performance against the respondents, whereas, specific performance on the part of the complainant could not be enforced.

16. For that there is no authority of law for requiring this respondent to give the complainant and the other negro firemen notice, opportunity to be heard, or a vote on any matter, and a decree in conformity with the prayer of the bill would impose upon this respondent conditions not provided for by the Railway Labor Act.

17. For that this respondent has a right to act as exclusive bargaining agent for the entire craft or class without giving to any individual notice, opportunity to be heard or a vote.

[fol. 82] And as amended, this respondent refiles its demurrers I, II, III, IV, V, VI, VII, VIII to the amended bill of complaint, as last amended, and to the aspects of said amended bill described in said demurrers.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for respondent, Brotherhood of Locomotive Firemen and Enginemen.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDED DEMURRER OF LOUISVILLE & NASHVILLE RAILROAD COMPANY—FILED JUNE 16, 1942

Comes respondent, Louisville & Nashville Railroad Company and amends its demurrer to the bill of complaint as

last amended, and as separate and several grounds of demurrer adopts all of the grounds of amended demurrer of the Brotherhood of Locomotive Firemen and Enginemen to the bill of complaint as last amended, and this respondent refiles its demurrers numbered 1 to 55, inclusive, to the amended bill of complaint as last amended, and to the aspects of said amended bill described in said demurrers, and adds thereto the following grounds of demurrer:

56. To that aspect of paragraph eleven of the bill as last amended, wherein it is stated that in fact said notice, agreement and modification have been approved by all of the white firemen of the defendant railroad;

(a) For that said language is a mere conclusion of the pleader and is not sufficient to charge any responsible agent of the defendant with ratifying or approving the agre-ment or modification.

(b) For that the allegation "they have claimed all rights and benefits of the same" does not charge this defendant with the ratification or adoption of said agreement to the detriment of complainant.

(c) For that said averment is at most a mere conclusion of the pleader.

[fol. 83] (d) For that said language is not sufficient to charge this respondent with any wrongful act in the premises.

(e) For that said language does not charge this respondent with a violation of any duty or the breach of any agreement with complainant.

(f) For that said language does not charge this respondent with any acts of conspiracy or any wrongful participation in any act or agreement giving rise to a cause of action in favor of the complainant.

Chas. H. Eyster, White E. Gibson, Solicitors for respondent, Louisville and Nashville Railroad Company.

IN CIRCUIT COURT OF JEFFERSON COUNTY

STIPULATION SETTING ASIDE SUBMISSION ON DEMURRERS AND GRANTING LEAVE TO WITHDRAW AMENDED COMPLAINT AND TO SUBSTITUTE ANOTHER AMENDED COMPLAINT—Filed July 17, 1942

To the Honorable C. M. Creel, Chancellor:

The undersigned Solicitors of records for the complainant and respondents respectively in the above styled cause hereby agree as follows:

1. That the submission heretofore made on demurrers to the bill of complaint as amended be set aside.

2. That the Complainant be given leave to withdraw the amended complaint heretofore filed, and be permitted to substitute in the place thereof another amended complaint.

Arthur D. Shores, Solicitor for Complainant. Chas H. Eyster & White E. Gibson, Solicitors for Respondent, L. & N. R. R. J. A. Simpson, Solicitor for B. L. F. & E.

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[fol. 84] IN CIRCUIT COURT OF JEFFERSON COUNTY

DECREE SETTING ASIDE SUBMISSION—July 17, 1942

In this cause an agreement was filed by the Solicitors of record for the parties thereto authorizing the Court to set aside the submission heretofore made on demurrers to the bill of complaint as amended, with leave to withdraw the amended complaint heretofore filed and file a substitute therefor, and the Court being of the opinion that the agreement should be confirmed, it is,

Ordered, Adjudged and Decreed by the Court that the submission of the several demurrers to the bill of complaint as amended heretofore taken on the 15th day of June, 1942, be and the same is hereby set aside and complainant is hereby authorized to file a substitute bill in said cause in lieu of the present bill as amended.

Done and Ordered this the 17th day of July, 1942.

E. M. Creel, Circuit Judge, In Equity Sitting.

IN CIRCUIT COURT OF JEFFERSON COUNTY

SUBSTITUTED AMENDED COMPLAINT (FILED BY LEAVE OF COURT FIRST HAD AND OBTAINED)—Filed August 14, 1942

To the Honorable Judge or Judges of said Court:

1. Your Complainant, otherwise known as B. W. Steele, or Will Steele; shows unto your Honor that he is a resident of Jefferson County, Alabama, and over twenty-one years of age; that respondent, Louisville & Nashville Railroad Company (hereafter called the railroad) is a corporation incorporated in the State of Kentucky but engaged in interstate commerce by rail in the State of Alabama; that respondent Brotherhood of Locomotive Firemen & Enginemen (hereafter called the Brotherhood) is an international unincorporated labor union whose membership is principally derived from white locomotive firemen and enginemen employed on interstate railroads, including the defendant railroad. It comprises a Grand Lodge, over 900 subordinate lodges and 89,000 members throughout this country and Canada, including lodges, officers and members resident in Jefferson County, Alabama. It has an international treasury derived from dues paid by members when they are working, and other revenue. By constitution, practice and ritual its membership is restricted to white men, all negro firemen being excluded solely because of race. [fol. 85] Respondent W. H. Thomas is a resident of Jefferson County, Alabama, an engineer fireman employed on defendant railroad, a member of the Brotherhood, and Local Chairman of Brotherhood Local Lodge No. 916, and by-law of the Brotherhood and delegation of its power by the Brotherhood as representative under the Railway Labor Act of June 21, 1934, 48 Stat. 1185, c. 691; 45 U. S. C. A. c. 8, represents the entire craft or class of firemen employed by the railroad on the South and North Alabama Division with regard to adjustment of seniority rights and job assignments (See Arts. 25 and 26, Exhibit I below). Respondent J. P. Adams is a resident of Montgomery County, Alabama, an engineer-fireman employed on said railroad, a member of the Brotherhood, and Local Chairman of Brotherhood Local Lodge No. 864, and by-by-law of the Brotherhood and delegation of its power by the Brotherhood as representative under the Railway Labor Act, represents the entire

craft or class of firemen employed by the railroad on the Montgomery and Mobile Division with regard to adjustment of seniority rights and jobs assignments, as above stated. Respondent B. F. McGill is a resident of Mobile County, Alabama, an engineer fireman employed on said railroad, a member of the Brotherhood and Local Chairman of Brotherhood Local Lodge No. 689, and by by-law of the Brotherhood and delegation of its power by the Brotherhood as representative under the Railway Labor Act, represents the entire craft or class of firemen employed by the railroad on the Mobile and New Orleans Division with regard to adjustment of seniority rights and job assignments, as above stated.

2. Complainant is a negro fireman employed by the railroad on its South and North Alabama Division. He brings this suit (1) in his individual capacity for wrongs inflicted on his individual rights, and (2) as representative of all the negro firemen and helpers on other than steam power (hereafter compendiously called firemen) employed by respondent railroad, particularly those employed on the four seniority districts known respectively as the South and North Alabama Division above, the Montgomery and Mobile Division above, the Mobile and New Orleans Division above, and the Pensacola Division. Said negro firemen constitute over a hundred men resident in several states, a class too large to be brought individually before this Court; but there are common questions of law and fact affecting their [fol. 86] several rights, common grievances growing out of common wrongs, and common relief is sought for the entire class as well as special relief for this complainant. The interests of the class are fairly and adequately represented by complainant.

3. Respondent railroad is sued on its own right. Respondent Brotherhood is sued in its own right and as representative of all its individual members, specifically those employed by respondent railroad and particularly those employed on the four seniority districts above named. Respondents W. H. Thomas, J. P. Adams and B. F. McGill are sued as members of the Brotherhood and as representatives of all the Brotherhood members, specifically those employed by respondent railroad and particularly those employed on the four seniority districts above named. The

Local Chairman of the Pensacola Division is a non-resident of the State of Alabama. The Brotherhood-member fireman on the four seniority districts above named constitute several hundred men resident in several states, and the Brotherhood-member firemen on the entire system of respondent railroad are even larger in number. They constitute a class too numerous to be brought individually before this Court; but there are common questions of law and fact affecting their several interests, and all their alleged rights and claims in the premises are directly derived from and wholly dependent upon the acts of the respondent, Brotherhood as their representative under the Railway Labor Act, and common relief is sought against them as a class, as well as special relief against those individuals wrongfully holding jobs which negro firemen are entitled to under their contracts with the railroad and which they would be holding except for the acts of the railroad and the Brotherhood under color of the Agreement and Modification thereof hereinbelow set out as Exhibits III and IV.

The individual Brotherhood-member firemen wrongfully holding said jobs are constantly changing due to promotions, transfers and other causes, but the interests of the Brotherhood-member firemen employed on respondent railroad in the premises are fairly and adequately represented by the Brotherhood itself without more, as well as by the individual respondents.

[fol. 87] 4. Complainant is 55 years of age, in perfect health, with no physical defects or infirmities affecting his capacity as a fireman. He has been employed by the respondent railroad as a locomotive fireman since February 4, 1910, and has worked as such on the South and North Alabama Division since March 5, 1910, with seniority rights (Exhibit I below) from the latter date. He worked as a fireman in road passenger service on said Division from December 28, 1921, to April 8, 1941, when he was displaced by the wrongs of the railroad and the Brotherhood as set out below. In all respects he has at all times performed his duties as a locomotive fireman loyally and efficiently to the best interest and complete satisfaction of the railroad. He has not had a demerit, complaint or been subject to disciplinary action within the past sixteen years. At all times when he was wrongfully displaced he tendered himself to both the railroad and the Brotherhood as ready,

able and willing—and was in fact ready, able and willing—to serve on the jobs he was entitled to under his contract with the railroad.

5. Complainant was originally employed by the railroad and is still working for it under an individual contract of hiring between himself and the railroad. His contract has been modified from time to time by mutual agreement between plaintiff and the railroad, and presently embodies the terms of the collective bargaining "*Agreement between the Louisville & Nashville Railroad and Its Locomotive Firemen and Hostlers*" issued March 1, 1929, and incorporated in full herewith as Exhibit I attached hereto (and previously referred to herein).

6. The other negro firemen employed by the railroad are working under their respective individual contracts of hiring between them and the railroad. Their present contracts embody the terms of Exhibit I.

7. The negro firemen constitute a minority of the total number of firemen employed by respondent railroad, but constitute a majority of the firemen employed on each of the four seniority districts listed above. The Brotherhood-member firemen constitute the majority of the total number of firemen employed on the entire system of respondent railroad, but constitute the minority of the firemen on the said four seniority districts. The negro firemen and the [fol. 88] Brotherhood-member firemen together comprise the entire craft or class of firemen employed on respondent railroad.

8. By virtue of the fact they constitute the majority of the firemen on the entire system, the Brotherhood-member firemen ever since the passage of said Railway Labor Act have chosen the Brotherhood as the representative under said Act of the entire craft or class of firemen employed by respondent railroad. Complainant does not know, and because the proceedings of the Brotherhood are secret, cannot ascertain or state the method of selection, but avers that the Brotherhood with the knowledge of its said members has claimed the exclusive right to act and has acted as the exclusive bargaining agent and grievance representative of the entire craft or class aforesaid, and further avers that said Brotherhood members have individually and collectively claimed the benefits of all actions by the Brotherhood

as representative under the Railway Labor Act of the entire craft or class of firemen in the premises.

9. Neither complainant nor any of the other negro firemen has ever been given an opportunity to nominate or participate in the choosing of a representative of the entire craft or class under the Railway Labor Act; but by virtue of their minority position they have been compelled to accept the Brotherhood as choice of the majority for their statutory representative under the Railway Labor Act for the purposes of the Act. They did so accept the Brotherhood as the representative under the Railway Labor Act of the entire craft or class of firemen, including themselves, and assuming that the Brotherhood would exercise its powers under the Railway Labor Act without fraud or discrimination against them they relied on it for protection of their rights in collective bargaining and handling of grievances with respondent railroad.

10. Negroes are not employed on railroads as locomotive firemen except in the South. The bulk of such employment is on the railroads listed in Exhibits II and III below. On each individual railroad so listed the negro firemen constitute the minority of the craft or class on the entire system, although they constitute the majority on certain seniority districts. On each individual railroad so listed the Brotherhood-member firemen constitute the majority of the craft or class on the entire system, although they constitute the minority on certain seniority districts. On each said railroad the Brotherhood-member firemen ever since [fol. 89] the passage of the Railway Labor Act aforesaid have chosen the Brotherhood as the representative under the Act of the entire craft or class, but for reasons stated above complainant can not state the method used.

11. By accepting the designation as representative of the entire craft or class of firemen employed by respondent railroad under the Railway Labor Act, and by asserting the exclusive right under the Railway Labor Act to represent said craft or class in collective bargaining and handling of grievances, the Brotherhood placed itself in a confidential relation with each fireman and undertook a fiduciary duty to represent him impartially, in good faith; to give him reasonable notice, opportunity to be heard and a chance to vote on any action proposed by it as his statutory representa-

tive adverse to his interest: to make prompt and full disclosure of all actions taken by it affecting his interests in any way; not to discriminate against a non-member in favor of itself and its members: and generally to conform to and respect the rules of law and standards of conduct governing the relations of principal and agent, as the statutory representative of the entire craft or class of firemen under the Railway Labor Act. Nevertheless in violation of its duty the Brotherhood has persistently been and is now hostile and disloyal to complainant and the minority non-member negro firemen, has persistently sought and still seeks to destroy their *desired* seniority rights and to drive them out of employment of the railroad in order to create a monopoly of employment, or failing that the most favored conditions of employment regardless of seniority, competence or worth, for its own members. It has always refused and still refuses to notify complainant or the other negro firemen of proposed actions adversely affecting their interests, to give them a chance to be heard or vote on the same; has always refused and still refuses to report to them its actions as their statutory representative under the Railway Labor Act or to handle their just grievances wherever there is a conflict of interest between them and Brotherhood members, has persistently refused and still refuses to give them fair, honest and faithful representation under the Railway Labor Act.

[fol. 90] 12. On or about March 28, 1940, in fraud of the rights of complainant and the other negro fireman employed by the railroads listed in Exhibits II and III below, and without notice or opportunity to be heard or to vote on the matter being given them, the Brotherhood (by and thru its General Chairman on each said railroad, including respondent railroad, thereunto duly and expressly authorized and acting within the line and scope of his employment) purporting to act under the Railway Labor Act on behalf of the entire craft or class of firemen, did serve on each said railroad a Notice to amend existing collective bargaining agreements covering the standard provisions in the individual hiring contracts of the individual firemen on each railroad, aimed at driving the negro firemen completely out of the service of said railroads to the profit of itself and its own members, regardless of seniority, competence or worth. A

copy of said Notice is hereto attached as Exhibit II and incorporated in full herewith.

13. According to existing railroad practice in the United States locomotive engineers are obtained by promotion of selected white locomotive firemen. By traditional and universal railroad practice in the United States negro firemen arbitrarily are never promoted to engineers, regardless of knowledge, experience, competence and worth. To distinguish the white firemen as a class from the negro firemen as a class, the white firemen are known under standard railroad practice as "promotable men", while the negro firemen are known as "non-promotable men"; and the phrases "promotable men" and "promotable firemen or helpers" used in said Notice (Exhibit II above) mean white firemen and helpers in contrast to negro firemen and helpers.

14. At all times the general officers of respondent railroad, specifically—the Director of Personnel and his staff who by by-law and usage of the railroad have charge of all conditions of work among employees, have known that the Brotherhood has always been hostile to Complainant and the minority negro firemen, that it has persistently sought to destroy their vested seniority rights and drive them out of service in order to create a monopoly of employment, or failing that the most favored conditions of employment regardless of seniority, competence or worth for its own members; and said officials well knew that the Notice (Exhibit II above) served was in execution of the fraudulent disloyal purposes of the Brotherhood aforesaid.

[fol. 91] 15. By virtue of the contracts which it had entered into with complainant and the other negro firemen the railroad was under a duty to them to give preference of runs to the oldest fireman in road service when competent and worthy. Yet well knowing the hostility and motives of the Brotherhood toward complainant and the other negro firemen, that the objects aimed at in said Notice were opposed to preferences based on seniority, competence and worth; that the purpose of the Notice was to cause the railroad to breach its contracts with the negro firemen, and to curtail their seniority rights and destroy their employment in order to create a monopoly of employment for the Brotherhood-member firemen, the

railroad did violate its duty to plaintiff and the other negro firemen to give preference of runs to the oldest fireman in road service when competent and worthy, and did enter into an Agreement dated February 18, 1941, effective February 22, 1941 (the text of which, with signatures of defendant railroad's general offices omitted, is attached hereto as Exhibit III and incorporated in full herewith), discriminating against the complainant and other negro firemen in favor of the Brotherhood-member firemen who constituted the entire class of men designated in said Agreement as the "promotable firemen and helpers". In negotiating and executing said Agreement the respective officers of the Brotherhood and the railroad severally and collectively acted within the line and scope of their employment as such.

16. Thereafter on May 12, 1941, the railroad by and thru its Director of Personnel then and there acting within the line and scope of his employment, and the Brotherhood by and thru its General Chairman on the respondent railroad then and there acting within the line and scope of his employment, made a modification of said Agreement (Exhibit III above) further curtailing complainant's and the other negro firemen's seniority rights and restricting their employment, to the unfair advantage of the Brotherhood member-firemen, the "promotable firemen and helpers." A copy of said modification is hereto attached as Exhibit IV and incorporated in full herewith. In negotiating and executing said modification (Exhibit IV) the Brotherhood purported to act as the representative under the Railway Labor Act of the entire craft or class of firemen on respondent railroad, without notice, opportunity to be heard or a chance to vote on the same.

[fol. 92] 17. The Brotherhood never reported to complainant or any other negro firemen that it had negotiated and executed either the Agreement (Exhibit III) or modification (Exhibit IV), but complainant and the negro firemen were forced to obtain their knowledge of the same from other sources.

18. In negotiating and executing said Agreement and modification the railroad, acting by and thru its general officers who were then and there acting within the line and scope of their employment, did conspire and confederate

with the Brotherhood to curtail the seniority rights and job assignments of complainant and the negro firemen in breach of existing contracts with the negro firemen, to the fraudulent advantage of the Brotherhood-member firemen. In further execution of said conspiracy the railroad and the Brotherhood did put said Agreement and modification into effect as the controlling operative policy on the entire railroad system, particularly the four seniority districts above named, without any notice to complainant or the other negro firemen, or without giving them a hearing or opportunity to protest the same.

19. As the controlling operative policy on respondent railroad system practically every time a vacancy occurred on the four seniority divisions or a new run or job was created on the same, the Brotherhood and the railroad in further execution of said conspiracy arbitrarily disqualified complainant and the other negro firemen regardless of seniority, competence and worth, and assigned said vacancies and new jobs and runs to Brotherhood-member firemen junior in seniority to the negro firemen, without regard to competence or worth under color of said Agreement and modification. As a result of said wrongful acts the employment of negro firemen on said four seniority districts was severely curtailed to the corresponding wrongful increase in the employment of Brotherhood-member firemen; the Brotherhood itself was unjustly enriched by virtue of increased dues paid by Brotherhood-member firemen as a result of their increased employment (Brotherhood-member firemen do not pay dues when furloughed).

[fol. 93] 20. Prior to the passage of the Railway Labor Act aforesaid and down to April 8, 1941, complainant by virtue of his seniority, competence and worth was a fireman in road passenger service assigned to the South-End Passenger Pool, running between Birmingham and Montgomery, rotating first-in first-out, handling certain specified regular passenger trains. Assignments to the South-End Passenger Pool constitutes one of the most favored jobs in rates of pay and working conditions available to firemen in the South and North Alabama Division. Complainant's monthly earnings, after deduction of $7.65 insurance, $2.60 hospital fund and $3.00 per $100.00 earned for retirement, averaged while in the Pool about $225.00. His

longest run did not exceed 3½ hours; he did not have to clean fires, received his engine at the passenger station starting the trip and was relieved at the passenger station on the end of the trip.

21. On or about April 1, 1941, the jobs in said South-End Passenger Pool were bulletined for bidding-in because the number of firemen in the Pool had to be reduced after April 7, 1941, due to reduction in mileage. On April 1, 1941, the firemen in the Pool with respective seniority dates were as follows:

| | |
|---|---|
| Bester William Steele, colored | March 5, 1910 |
| Henry Russell, colored | June 25, 1917 |
| M. E. Bowen, white | August 20, 1917 |
| Arthur Willingham, colored | November 13, 1919 |
| John Harris, colored | March 23, 1920 |
| John Wooley (swing man) colored | December 17, 1922 |

The negro firemen were rendering satisfactory service in the Pool, no complaints had been made against them and they were competent, worthy and entitled to remain in the Pool by virtue of their seniority, competence and worth (subject to the rights of M. E. Bowen who was senior to Willingham, Harris and Wolley). Yet the railroad and the Brotherhood in further execution of said conspiracy did arbitrarily disqualify all the negro firemen from bidding in any Pool job under color of said Agreement and modification, and did assign the Pool jobs to Brotherhood-member firemen whose seniority dates were as follows: [fol. 94]

| | |
|---|---|
| M. E. Bowen, Brotherhood-member | August 20, 1917 |
| B. W. Morgan, Brotherhood-member | April 4, 1925 |
| C. B. Nance, Brotherhood-member | February 25, 1940 |
| Raymond B. Matthews, Brotherhood-member | March 8, 1940 |

Said Brotherhood-member firemen were not more competent or worthy than complainant or the other negro firemen, but were given the Pool jobs solely by force of said Agreement and modification because they were Brotherhood members, belonging to the class designated in the Notice, Agreement and modification aforesaid as "promotable firemen and helpers" in contrast to the negro firemen, the "non-promotables."

22. As a result of being illegally and fraudulently barred from bidding-in a Pool job as he was entitled to and to hold by virtue of his seniority, competence and worth, complainant was thrown completely out of work from April 8, 1941 to April 24, 1941. On April 25, 1941, he obtained a job firing an engine for a local freight run which meant an average of twelve hours on a run, going 5 miles *further* to get his engine and to be relieved, harder work on the engine to keep up steam because freight engines burn an inferior grade of coal compared to that burned in passenger service, and more arduous labor throughout the run; further his health was impaired because of the longer hours without hot food and by increased constipation because he was deprived of comfort facilities for longer periods; and his average earnings were reduced about $75.00 per month. Further his rights under the Railway Pension Act of June 24, 1937, 50 Stat. 310, c. 382, 45 U. S. C. A. c. 9, were impaired, and his potential retirement annuity diminished by his loss of earnings aforesaid.

23. Thereafter on or about December 22, 1941, the railroad and the Brotherhood in further execution of said conspiracy under color of said agreement and modification did arbitrarily and wrongfully displace complainant on said local freight run by a Brotherhood-member fireman junior in seniority to him, although no complaint had been made about his work and he was in every respect as competent and worthy as the Brotherhood member who displaced him, and was in fact wholly competent and worthy to hold said local freight run and was holding it to the satisfaction of the railroad. As a result complainant had to take a job of firing a switch engine by hand, which was even more [fol. 95] arduous than the local freight service above. He was forced to serve longer hours, work more days per month, yet received less money than either on the local freight run or in the Pool service. By virtue of said conspiracy the railroad and the Brotherhood wrongfully kept complainant on the switch engine until January 3, 1942, when he was reassigned to the South-end Passenger Pool. Complainant avers that by seniority, competence and worth he was entitled to have remained in the Pool at all times and never to have been removed therefrom.

23. Complainant and the negro firemen have exhausted their remedies within the structure of the railroad and the

Brotherhood. They protested as soon as they discovered said Agreement and modification both to the railroad and the Brotherhood, to no avail. They appealed their protests to the highest operating officer of the railroad with jurisdiction in the premises and to the general officers of the Brotherhood, including its General Chairman on respondent railroad; yet all the railroad officers and all the Brotherhood officers acting within the line and scope of their several employments have reaffirmed on behalf of the railroad and the Brotherhood both the Agreement and modification, and expressed their intentions to enforce same now and in the future; and unless restrained by this Court the seniority rights and job assignments of complainant and the negro firemen will be continuously threatened and curtailed by defendants railroad and Brotherhood acting in conspiracy under color of said Agreement and modification, and they will be deprived of fair, honest and impartial representation by the Brotherhood as the representative of the entire craft or class of firemen under said Railway Labor Act.

24. Complainant and the other negro firemen to ascertain part of their damages must know the names, time worked and amounts earned by every Brotherhood-member fireman junior in seniority to them, on every job on respondent railroad from which negro firemen were displaced by the railroad and the Brotherhood under color of the aforesaid Agreement and modification. Neither complainant nor any of the negro firemen has this information, nor does he have any source from which to obtain same except thru the railroad and the Brotherhood. Both the railroad and the Brotherhood have this information readily available, same is material to the issues in this suit, and complainant is [fol. 96] entitled to have same discovered and made known by them.

25. Complainant and the other negro firemen to establish the conspiracy and the discriminations against them by the railroad and the Brotherhood must know how the Brotherhood arrived at its decision to serve the Notice (Exhibit II above), all contacts it had with the railroad concerning the same, all steps in the negotiations leading up to the Agreement (Exhibit III) and modification (Exhibit IV), and all proposals by either to the other in enforcement of said Agreement and modification, and action taken on said

proposals. Further they must know all proposals by either the railroad or the Brotherhood to the other, and all actions taken on said proposals (wherever the proposal and action have not already been communicated to complainant and the negro firemen) aimed at or like- to result in curtailing their seniority rights or restricting their employment in any way in favor of the Brotherhood-member firemen. Neither complainant nor any other negro fireman has any of this information, nor does he have any source from which to obtain same except thru the railroad and the Brotherhood. Both the railroad and the Brotherhood have all this information readily available; same is material, even indispensable, to the issues in this suit, and complainant is entitled to have same discovered and made known by them. As to the Brotherhood complainant avers that by virtue of the confidential relationship between the individual negro firemen and the Brotherhood, and the fiduciary duty which the Brotherhood owes each of them as representative of the entire craft or class of firemen under the Railway Labor Act, the Brotherhood is under the affirmative duty of making the discovery called for.

26. An actual claim or controversy exists between complainant and the negro firemen as a class on one side, and the railroad, the Brotherhood and the Brotherhood-member firemen on the other as to the duties of the Brotherhood toward the negro firemen as representative of the entire craft or class of firemen under the Railway Labor Act; and as to the lawful force and effect, if any, of the Agreement and modification aforesaid. The interests on each side are adverse, and unless this Court will declare the rights, duties, interests and legal relations of the parties, numerous vexatious disputes will arise between the parties, and the complainant and the negro firemen will suffer irreparable injury to their seniority rights, and their [fol. 97] retirement rights under the Railroad Retirement Act.

27. The Railway Labor Act, particularly Section 2-Fourth (45 U. S. C. A. Sec. 152-Fourth), so far as it attempts to confer on the majority of a craft or class of railway employees the power to choose the representative for the entire craft or class, and to confer on said representative unbridled and absolute power to destroy minority property

rights in favor of the majority, is void as violating the due process clause of the Fifth Amendment to the Constitution of the United States.

Wherefore, Premises Considered: Your Complainant prays that W. H. Thomas, 4301 Pulaski Street, Inglenook, Birmingham, Alabama; J. P. Adams, 1034 Forest Avenue, Montgomery, Alabama; and B. F. McGill, 261 Rapier Avenue, Mobile, Alabama, respondents, be made parties to these proceedings by proper process; that they be required to plead, answer or demur thereto within the time prescribed by law, and that the other respondents being already before this Court by process lawfully served upon them, be required to plead, answer or demur thereto within the time prescribed by law; and further pray that:

1. He be granted a permanent injunction against each respondent and the persons they severally represent enjoining them and each of them from enforcing, making any claims under, or otherwise recognizing said Agreement and modification thereof.

2. Discovery by the railroad and the Brotherhood of the names, time worked and amounts earned by every Brotherhood member fireman junior in seniority to any negro fireman displaced by such Brotherhood-member fireman under color of said agreement and modification.

3. Discovery by the railroad and the Brotherhood, as they may respectively have the information available, of the process by which the Brotherhood arrived at its decision to serve the Notice (Exhibit II), all contacts between the railroad and the Brotherhood concerning the same, all steps in the negotiations leading up to the Agreement (Exhibit III) and modification (Exhibit IV), and all proposals by either to the other in enforcement of said Agreement and modification, and action taken on said proposals; and further all proposals by either railroad or Brotherhood to the other and all actions taken on said proposals (wherever the proposal and action have not already been communicated to complainant and the negro firemen) aimed at or like to result in curtailing their seniority rights or restricting their [fol. 98] employment in any way in favor of the Brotherhood-member firemen.

4. A permanent injunction against respondent Brotherhood, its officers, subordinate lodges, members, agents, or

attorneys, and the individual defendants perpetually enjoining them and each of them from purporting to act as representative of complainant or the other negro firemen on respondent railroad, under the Railroad Labor Act, so long as it or any of them refuses to give them notice, and an opportunity to be heard and to vote on proposals adversely affecting their interests, to make prompt and full disclosure of all actions taken by it or any of them affecting their interests in any way, and so long as it discriminated against any of them in favor of itself or any Brotherhood-member fireman.

5. A decree binding all parties and their privies and those represented herein, settling and declaring the respective rights, status, and other legal relations of the parties in, to and by reason of the matters here in controversy.

6. Damages against the Brotherhood for injuries sustained by plaintiff as a proximate consequence of the wrongful actions of the Brotherhood in breach of its confidential relation with and fiduciary duties toward plaintiff, in the sum of Fifty Thousand ($50,000.00) Dollars.

7. Damages against the Brotherhood for injuries sustained by the individual negro firemen as a proximate consequence of the wrongful actions of the Brotherhood in breach of its confidential relation with and fiduciary duties toward the said individual negro firemen, so far as said individual firemen may appear before this Court, submit to the jurisdiction thereof, and establish their damages in the premises by legal evidence.

8. General Relief.

Arthur D. Shores, 1630 4th Ave., N. Birmingham; J. T. Settle, 145 Beale Avenue, Memphis, Tenn.; Charles H. Houston, 615 F St. N. W. Wash., D. C.; J. C. Waddy, 615 F St., N. W. Wash., D. C. Attorneys for complainant.

[fol. 99] *Duly sworn to by Bester William Steele. Jurat omitted in printing.*

[fols. 100-101] CERTIFICATE OF SERVICE

I, Arthur D. Shores, do hereby certify that prior to filing this Substituted Amended Complaint I served a copy on Lange, Simpson, Brantley & Robinson, Esquires, Attorneys for the respondent Brotherhood, Nelson Building, Birmingham, Alabama, and on Gibson & Gibson, Esquires, White Gibson, Esquire, Chas. H. Eyster, Esquire, Attorneys for the respondent railroad, Comer Building, Birmingham, Alabama.

Arthur D. Shores.

August 14, 1942.

NOTE RE EXHIBIT I TO SUBSTITUTED AMENDED COMPLAINT

Exhibit One is a book entitled "Agreement between the Louisville and Nashville Railroad and its Locomotive Firemen and Hostlers, etc."

This book contains eighty-five pages, setting out in detail the rules, regulations, Mediation agreement, Arbitration Award, Supplementary agreement, rates and tables. The Original Exhibit will be sent to the Supreme Court for its inspection, along with the Court record.

EXHIBIT II TO SUBSTITUTED AMENDED COMPLAINT—Omitted. Printed side page 61 ante

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[fols. 102-112] EXHIBIT III TO SUBSTITUTED AMENDED COMPLAINT—Omitted. Printed side page 13 ante

EXHIBIT IV TO SUBSTITUTED AMENDED COMPLAINT OMITTED. Printed side page 16 ante

[fol. 113] IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF L. & N. R. R. CO. TO COMPLAINT—Filed August 26, 1942

Comes defendant in above cause and by leave of Court refiles all demurrers heretofore filed to complainant's complaint as separate and several grounds of demurrer to complainant's complaint as last amended.

Chas. H. Eyster, and White E. Gibson, Solicitors for L. & N. R. R. Co.

[fol. 114] IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF BROTHERHOOD TO THE SUBSTITUTED AMENDED BILL—Filed September 16, 1942

I

Comes the Brotherhood of Locomotive Firemen and Enginemen, one of the respondents in the above cause, and demurs to the substituted amended bill of complaint in this cause presented against it as a whole, and as grounds of said demurrer, sets down and assigns the following, separately and severally:

1. For that it does not appear therefrom that the individuals who negotiated the alleged contracts attached as exhibits to said substituted amended bill of complaint were agents, servants or employees of the members of this association generally, and were acting in the line and scope of their employment as such.

2. For that it does not appear therefrom with sufficient certainty that the individuals who negotiated and executed the alleged contracts were, at the time, acting within the line and scope of their authority as agents, servants, or employees of this association.

3. For that it does not appear therefrom with sufficient certainty that the individuals who negotiated and executed said contracts were, at the time, acting as agents, servants or employees of the members of this association within the line and scope of their authority as such.

4. For that there does not appear therefrom any reason why this association or the members thereof should be held accountable for the actions of the statutory representatives under the Railway Labor Act.

5. For that the allegation that complainant's contract embodied the standard provisions of the Firemen's and Hostlers' Schedule issued March 1, 1929, is a conclusion of the pleader.

6. For that the allegation that the complainant's employment status is a vested property right is a conclusion of the pleader.

7. For that the allegation that the white members of the Brotherhood have designated said Brotherhood as the ex-

clusive bargaining agent and grievance representative for the entire craft or class of firemen on defendant railroad is a conclusion of the pleader.

[fol. 115] 8. For that the averments thereof are so vague, indefinite and uncertain that this respondent is not sufficiently apprised as to what actions on its part are complained of by the various parties complainant.

9. For that it does not appear with sufficient certainty who was the designated bargaining agent for the entire craft or class under the Railway Labor Act.

10. For that it does not appear that this association has ever been certified as the exclusive bargaining agent under the Railway Labor Act.

11. There is no equity in the amended bill.

12. It affirmatively appears therefrom that this action is not maintainable against the members of this association generally.

13. For that it does not appear therefrom that this cause of action is a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

14. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

15. For that the substituted amended bill of complaint does not allege that the persons whose names appear on Exhibits 1 and 2 of the original bill of complaint as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by the members of this association to execute the said document or that the execution of said document was ratified by the members of this association.

16. For that it affirmatively appears therefrom that the execution of the document constituting Exhibits 1 and 2 of said substituted amended bill of complaint were neither authorized nor ratified by the members of this association.

17. For that it does not appear therefrom that the documents constituting Exhibits 1 and 2 of the said substituted amended bill of complaint were executed for or on behalf of the members of this association.

[fol. 116] 18. For that it affirmatively appears therefrom that the documents constituting Exhibits 1 and 2 of said substituted amended bill of complaint were not executed for or on behalf of the members of this association.

19. For that the allegation that complainant is employed by the defendant, Louisville & Nashville Railroad Company, on the S. & N. A. Division, with seniority rights as a firemen is a conclusion of the pleader.

20. For that the averments of the substituted amended bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

21. For that there are no facts alleged which show that complainant was entitled to seniority rights, nor is there any averment as to what seniority rights plaintiff was entitled.

22. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

23. For that it affirmatively appears therefrom that the complainant has no right to maintain this substituted amended bill on behalf of the other negro firemen.

24. For that it appears therefrom that the measure and extent of complainant's damages as well as the class of complainant's damages is materially different from that of others constituting the class which he seeks to represent.

25. For that it does not appear therefrom that the complainant has the consent or authority of the class which he seeks to represent.

26. For that it does not appear therefrom that the other members of the class which complainant seeks to represent have seniority rights or that their rights have been affected in any way by the action complained of.

27. For that the said substituted amended bill of complaint shows that said complainant is asking the benefits of the alleged contracts between the railroad and the locomotive firemen and hostler's schedules issued on March

1, 1929, and is unwilling to abide by the terms, provisions and conditions of the said alleged schedule or contract.

[fol. 117] 28. For that it does not appear therefrom that complainant, or any of the class which he seeks to represent, have sustained any injuries or damages as a result of the action complained of.

29. For that there are not alleged therein any facts which make the alleged contract constituting Exhibits 1 and 2 of said substituted amended bill of complaint illegal, unconscionable or unfair.

30. For that it affirmatively appears therefrom that both parties respondent were free contracting agencies and had right to make and enter into the contracts set out as Exhibits to the substituted amended bill.

31. For that the relief prayed for in the substituted amended bill would be an undue interference with the rights of the parties respondent to contract as they have a right to do.

32. For that there is a misjoinder of parties complainant in that complainant seeks to combine a personal claim for damages with a claim of the negro firemen of the class for equitable relief.

33. For that the interest and injuries of the negro firemen do not sufficiently appear to enable the Court to adjudicate their rights in the premises.

34. For that an action for damages cannot be brought on behalf of a class.

35. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

36. For that no reason is alleged why this association can not execute any contract if so desired for the benefit of its members.

37. For that said substituted amended bill fails to allege or to set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

38. For that said substituted amended bill of complaint shows that complainant is seeking to obtain the benefits

of an alleged contract between the defendant company and this association as though he were a member of the said brotherhood or association, without the averment that he is a member of said brotherhood or association.

[fol. 118] 39. For that said substituted amended bill fails to allege what the alleged conspiracy was between the said railroad and this respondent.

40. For that said substituted amended bill does not allege facts sustaining the averment of conspiracy between the railroad and this respondent.

41. For that the allegation of the conspiracy between the railroad and this respondent is a conclusion of the pleader.

42. For that a corporation is incapable of entering into a conspiracy.

43. For that a voluntary association is incapable of entering into conspiracy.

44. For that it is not alleged that any of the members of this association entered into a conspiracy or that they authorized, ratified or condoned a conspiracy.

45. For aught that appears therefrom, the members of this association had no knowledge and were not parties in any way to the said contracts.

46. For that it is not alleged that the persons whose names appear on the said contract or any of them were agents, servants or employees of the members of this association, acting within the line, scope and course of their employment as such.

47. For that the allegations that this association was acting as exclusive bargaining agent under the Railway Labor Act of June 21, 1934, is a conclusion of the pleader and no facts are alleged to support the said conclusion.

48. For that the complainant has an adequate remedy at law.

49. For that the said substituted amended bill of complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the respondent railroad company by way of damages for breach of contract.

50. For that there are no facts alleged showing that plaintiff will suffer irreparable injury by the wrongs complained of.

[fol. 119] 51. For that the said substituted amended bill of complaint fails to allege any wrong doing by this association.

52. For that the said substituted amended bill of complaint fails to allege any wrong doing by the members of this association or any of them.

53. For that no facts are alleged which show that this association or any of the members of this association were under any duty to represent the complainant or any of them.

54. For that no facts are alleged to show any duty on any of the members of this association or any breach of any duty by the members of this association.

55. For that it does not appear therefrom that the said agreements or contracts are in any way binding upon any of the complainants or respondents or either of them.

56. For that the remedy of complainants, if the defendant railroad has breached its contract or contracts with them, is at law by way of damages for breach of contract, and for aught appearing from the said substituted amended bill of complaint, said remedy would be entirely adequate.

57. For that no facts are alleged showing any right which equity will protect by injunction.

58. For that it is not alleged therein that the complainant, as a class, was discriminated against by the said contract and it affirmatively appears therein that the classification made by said contract is reasonable.

59. For that the said substituted amended bill fails to allege that the alleged contract between the railroad and this association dated February 18, 1941, is illegal or unlawful in any respect.

60. It affirmatively appears therefrom that the said contract complained of by complainants was a contract which this respondent had a perfect right to negotiate, make, execute and put into effect.

61. For that it affirmatively appears therefrom that complainant's remedy, if any, is by and through the adminis-

trative agencies set up by the said Railway Labor Act and that the remedies therein prescribed are adequate.

[fol. 120] 62. For that it appears affirmatively therefrom that if complainants have any cause of action it is against the individuals who participated in the alleged wrong and not against the members of this association.

63. For that it affirmatively appears therefrom that there is no authority or warrant of law for the maintenance of this action against and in the name of this unincorporated organization or association.

64. For that the complainants ask equitable relief without submitting themselves to the jurisdiction of this Court and are not amenable to this Court and not amenable to the process of this Court.

65. For that the record shows that this Court has no jurisdiction of the members of this association and has no power to render a decree affecting their individual rights.

66. For that it affirmatively appears that this Court has no jurisdiction to render a money decree against any of the members of this association or as against this association as such.

67. For that it affirmatively appears that the decree of this Court would be unenforceable as against the individual members of this association.

68. For that it affirmatively appears that this Court has no jurisdiction over the non-resident members of this association and can not interfere with their freedom of contract.

69. For that this Court judicially knows that the members of this association are not liable for the tortuous acts of officers or agents of the association done without the authorization, approval or ratification of the said members.

70. For this Court judicially knows that the officers of this association have no power to bind the individual members of the said association in any way.

71. For that this association is not a proper party respondent to this substituted amended bill of complaint.

72. For that this association is not a legal entity.

[fol. 121] 73. For that no affirmative relief can be granted against this unincorporated association on this cause of action.

74. For that the said substituted amended bill of complaint is multifarious in that it seeks to combine in the one substituted amended bill of complaint a great number of separate and individual causes of actions by various parties complainants, each standing on separate facts and circumstances and each demanding its own individual and separate class and degree of relief.

75. For that it affirmatively appears therefrom that the rights of the various parties complainants vary widely in the class and type of relief sought as well as the degree of the relief to which they are entitled and therefore, the said substituted amended bill of complaint is multifarious.

76. For that it is *now* shown thereby that the complainants or any of them will suffer irreparable injury by the putting into effect of the alleged contract.

77. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

78. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

79. For that it affirmatively appears therefrom that the questions presented are moot.

80. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

81. For that the allegations that all the white firemen who have been in "the pool" at any time material herein or who are now in "the pool," or who may be eligible for "the pool," are fully and fairly represented by said Brotherhood in this proceeding, is a conclusion of the pleader.

82. For that the allegation that said notice, agreement and modification have been approved by all the white firemen on the defendant railroad is not sufficient to charge that

said firemen actually participated in the wrongful acts charged or ratified same.

[fol. 122] 83. For that the approval by any of the white firemen of the acts complained of is not sufficient to impose upon them legal liability.

84. For that it affirmatively appears from the substituted amended bill of complaint, as last amended, and the exhibits thereto that the rates, rules and working conditions as provided by the Locomotive Firemen and Hostlers' schedule was subject to thirty days written notice by either party.

85. For that it does not appear that the complainant's respective contracts of employment have been breached; but it affirmatively appears that the defendant railroad company was within its legal rights in modifying the complainant's respective contracts.

II

And this respondent demurs to that aspect of said substituted amended bill of complaint which prays a perpetual injunction and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill of complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that this Court has no sufficient jurisdiction to render a decree enjoining the members of this association from doing the things and matters complained of therein.

7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due process of law.

8. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

[fol. 123] 9. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

10. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

11. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensabe parties to this substituted amended bill of complaint.

12. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

13. For that the same amounts to a bill for specific performance.

14. For that it affirmatively appears therefrom that the questions presented are moot.

15. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

16. For that under the alleged contract, the breach of which complainant seeks to enjoin, the complainants would not receive anything unique in value, but would receive only money.

III

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks a discovery, and

for grounds of said demurrer, sets down and assigns the following:

1. For that the said substituted amended bill of complaint is not sworn to.

2. For that the allegations thereof are not made under oath.

3. For that there is no equity in the said aspect of the substituted amended bill.

4. For that it affirmatively appears therefrom that the complainants have an ad-quate remedy at law.

5. For that complainants show no right to a discovery.

6. For that the allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain, and the prayer thereof is so vague, indefinite and uncertain that this respondent is not apprised of what it is [fol. 124] called upon to defend or what it is called upon to produce in the way of a discovery.

7. For that the said allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the said complainants are seeking or what information they are entitled to.

8. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

9. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

10. For that no facts are alleged which show that the members of this association have the information, a discovery of which is prayed.

11. For that there is alleged no duty on the part of the members of this association to give the complainants, or any of them, a discovery of the information therein sought.

12. For that it does not appear therefrom that the members of this association, or any of them, participated in

any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

IV

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks an injunction against this respondent enjoining it and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen on the defendant railroad, and for grounds of said demurrer, sets down and assigns the following:

[fol. 125] 1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears from the allegations thereof that this association has a right under the said Railway Labor Act to act as representative for all the locomotive firemen on the said defendant railroad.

4. For that this Court has no power to bind the members of this association by any decree rendered in this cause.

5. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such a cause of action against the members of this association or organization.

6. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought and who are indispensable parties to this substituted amended bill of complaint.

7. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

8. For that it affirmatively appears that complainant's alleged rights have been restored.

V

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks a declaratory judgment, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that there is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

[fol. 126] 4. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

5. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

6. For that it does not appear therefrom that there is any justiciable controversy between the complainants or any of them and the members of this association.

7. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

8. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of actions or proceedings.

VI

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks damages against this Brotherhood and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it is not alleged therein that the members of this association participated in any way in, or in any way ratified, confirmed or approved the said action complained of.

5. For that it does not appear therefrom that the said contracts were negotiated or executed by agents, servants or employees of the members of this association acting [fol. 127] within the line and scope of their employment.

6. For that there is no authority or warrant of law for the awarding of damages to a class.

7. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

VII

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer, sets down and assigns the following:

1. For that it appears therefrom that the interests of the negro firemen on the S. & N. A. Seniority Division of the L. & N. Railroad Company are different in kind, class, and degree from the negroes on the other divisions of said railroad.

2. For aught appearing therefrom, many of the parties sought to be made parties complainant will not be injuriously affected by the action complained of.

3. For that it does not appear that any of the parties who are sought to be made parties complainant with the exception of complainant, Steele have suffered any injury, damages or invasion of right.

4. For that it does not appear that the contracts of the various parties sought to be made complainants embody the terms of the said Firemen's and Hostlers' Schedule.

5. For that it does not appear therefrom that the various parties complainant have any seniority rights.

6. For that it does not appear therefrom that the various parties complainant are entitled to any seniority rights or privileges or preference of runs.

7. For that it does appear therefrom that the various parties complainant have any vested property right which has been invaded by the actions complained of.

8. For that there is no equity in the said aspect of the substituted amended bill.

9. For that it affirmatively appears that the complainants [fol. 128] have an adequate remedy at law.

10. For that it does not appear therefrom that the complainant has the authority to represent said class.

11. For that it does not appear therefrom that the interests of the class which the complainant seeks to represent are identical with his own.

12. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

13. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

14. For that there is no authority or warrant of law for the awarding of damages to a class.

15. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

16. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint, and whose rights

will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

17. For that it appears that the white firemen who will be displaced by the relief sought are indispensible parties to this procedure.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for Respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF W. H. THOMAS, TO THE SUBSTITUTED AMENDED BILL—Filed September 16, 1942

Comes the respondent, W. H. Thomas, one of the respondents named in the substituted amended bill of complaint, and demurs to the substituted amended bill of com- [fol.129] plaint as a whole, and as grounds of said demurrer, sets down and assigns the following, separately and severally:

*I*

1. There is no equity in the bill.

2. For that there is a misjoinder of parties respondent.

3. For that this respondent wrongfully is joined with the other parties respondent named therein.

4. For that no joint cause of action is stated against this respondent and any other respondent named in the said bill.

5. For that it does not appear therefrom that the individuals who negotiated the alleged contracts attached as exhibits to the said bill were agents, servants or employees of this respondent acting within the line and scope of their employment as such.

6. For that there does not appear therefrom any reason why this respondent should be held accountable for the alleged wrongful acts therein set out.

7. For that the allegation that complainant's contract embodied the standard provisions of the Firemen's and Hostlers' Schedule issued March 1, 1929, is a conclusion of the pleader.

8. For that the allegation that the complainant's employment status is a vested property right is a conclusion of the pleader.

9. For that the allegation that the white members of the Brotherhood have designated said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on defendant railroad is a conclusion of the pleader.

10. For that the averments thereof are so vague, indefinite and uncertain that this respondent is not sufficiently apprised as to what actions on its part are complained of by the various parties complainant.

11. For that the same does not allege that the persons whose names appear on Exhibits 1 and 2 as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by this respondent to execute said document, or that said execution was rati- [fol. 130] fied by this respondent.

12. For that the averments of the substituted amended bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

13. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

14. For that there is a misjoinder of parties complainant.

15. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

16. For that the complainant has an adequate remedy at law.

17. For that the said substituted amended bill of complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the

respondent railroad company by way of damages for breach of contract.

18. For that the said substituted amended bill of complaint fails to allege any wrong doing by this respondent.

19. For that no facts are alleged which show that this respondent was under any duty to the complainants.

20. For that no facts are alleged to show any breach of duty by this respondent.

21. For this Court judicially knows that the officers of a labor union have no power to bind the individuals of the association in any way.

22. For that there is a misjoinder of parties respondent in that some of the parties respondent are necessary parties to the bill in one aspect and unnecessary parties to it in the other.

23. For that this respondent is wrongfully joined in that it is an unnecessary party to certain aspects of the bill. [fol. 131] 24. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

25. For that the approval by any of the white firemen of any of the facts complained of is not sufficient to impose liability upon this respondent.

26. For that it affirmatively appears from the bill of complaint, as last amended, and the exhibits thereto that the rates, rules and working conditions as provided by the Locomotive Firemen and Hostler's Schedule was subject to 30 days' written notice by either party.

27. For that it does not appear that complainant's respective contracts of employment have been breached; but it affirmatively appears that the defendant railroad company was within its legal rights in modifying the complainant's respective contracts.

28. For that it affirmatively appears therefrom that the questions presented are moot.

29. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

*II*

And this respondent demurs to that aspect of the said substituted amended bill of complaint which prays a perpetual injunction, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the said substituted amended bill of complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that the Court knows it is not within the power of this respondent to comply with the decree in conformity with the prayer.

[fol. 132] 7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due process of law.

8. For that the relief therein prayed, if granted, would not be enforceable as against this respondent.

9. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injur-ously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

10. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

11. For that the same amounts to a bill for specific performance.

12. For that under the alleged contract, the breach of which complainant seeks to enjoin, the complainants would

not receive anything unique in value, but would receive only money.

13. For that it affirmatively appears therefrom that the questions presented are moot.

14. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

*III*

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks discovery and for grounds of said demurrer sets down and assigns the following:

1. For that the said substituted amended bill of complaint is not sworn to.

2. For that the allegations thereof are not made under oath.

3. For that there is no equity in the said aspect of the substituted amended bill of complaint.

4. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

5. For that complainants show no right to a discovery.

6. For that the allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain and the prayer thereof is so vague, indefinite and uncertain that this respondent is not apprised of what it is called upon [fol. 133] to defend or what it is called upon to produce in the way of a discovery.

7. For that the said allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the same complainants are seeking or what information they are entitled to.

8. For that the relief therein prayed, if granted, would not be enforceable as against this respondent.

9. For that no facts are alleged which show that this respondent had or has access to the information, a discovery of which is prayed.

10. For that there is alleged no duty on the part of this respondent to give to the complainants or any of them a discovery of the information therein sought.

*IV*

This respondent demurs to that aspect of the substituted amended bill of complaint which seeks an injunction against the respondent brotherhood and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen of the defendant railroad, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that this respondent is an improper party to said aspect.

4. For this respondent is an unnecessary party to said aspect.

*V*

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks a declaratory judgment, and for grounds of demurrer sets down and assigns the following:

[fol. 134] 1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it does not appear therefrom that there is any justiciable controversy between complainants or any of them and this respondent.

4. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

5. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of action or proceedings.

VI

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks damages against the Brotherhood, and for grounds of demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill.

2. For that this respondent, merely by virtue of his connection with the Brotherhood, is not a proper party to said aspect of the said bill.

3. For that it is not alleged therein that this respondent authorized or ratified the alleged wrongful acts complained of.

4. For that there is no authority or warrant of law for the awarding of damages to a class.

5. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

6. For that the facts alleged do not warrant a personal judgment for damages against this respondent.

[fol. 135] VII

And this respondent demurs to this aspect of the said substituted amended bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer sets down and assigns the following:

1. For that it appears therefrom that the interests of the negro firemen on the S. and N. A. Seniority Division of the L. and N. Railroad Company are different in kind, class, and degree from the negroes on the other divisions of said railroad.

2. For aught appearing therefrom, many of the parties sought to be made parties complainant will not be injuriously affected by the action complained of.

3. For that it does not appear that any of the parties who are sought to be made parties complainant with the exception of complainant Steele have suffered any injury, damages or invasion of right.

4. For that it does not appear that the contracts of the various parties sought to be made complainants embody the terms of the said Firemen's and Hostlers' Schedule.

5. For that it does not appear therefrom that the various parties complainant have any seniority rights.

6. For that it does not appear therefrom that the various parties complainant are entitled to any seniority rights or privileges or preference of runs.

7. For that it does not appear therefrom that the various parties complainant have any vested property right which has been invaded by the actions complained of.

8. For that there is no equity in the said aspects of the substituted amended bill.

9. For that it affirmatively appears that the complainants have an adequate remedy at law.

10. For that it does not appear therefrom that the complainant has the authority to represent said class.

11. For that it does not appear therefrom that the interest of the class which the complainant seeks to represent are identical with his own.

12. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief [fol. 136] to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

13. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

14. For that there is no authority or warrant of law for the awarding of damages to a class.

15. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

16. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree

sought, and who are indispensable parties to this substituted amended bill of complaint.

17. For that there is a misjoinder of parties complainant.

18. For that there is a misjoinder of parties respondent.

19. For that this respondent is an improper party respondent to said bill.

20. For this respondent is improperly joined as party respondent.

21. For that no joint cause of action is alleged against this respondent or any other parties respondent to the said substituted amended bill of complaint.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for Respondent, W. H. Thomas.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

PLEA IN ABATEMENT OF J. P. ADAMS TO THE SUBSTITUTED AMENDED BILL—Filed September 17, 1942

Comes J. P. Adams, named as respondent in the substituted amended Bill of Complaint in this cause, and appearing specially for the purpose of pleading in abatement and for the purpose of testing the jurisdicton of ths Court, and for no other purpose, prays judgment of the Court that the Summons and Bill of Complaint be quashed because he says that he is a resident and citizen of the State of Alabama and a resident and cftizen of Montgomery County, Alabama; that he is not a resident of Jefferson County, Alabama; that the act or omission complained of in the Bill of Complaint did not occur in Jefferson County, Alabama.

This respondent says further that he is wrongfully joined as a party respondent to the said subsfituted amended [fol. 137] Bill of Complaint; that the same does not state a joint cause of action against him and any other party respondent who might be correctly sued in Jefferson County, Alabama, under the particular type of cause of action attempted to be set up in the said substituted amended Bill of Complaint.

Wherefore, he prays judgment on the said Summons and Bill of Complaint, and that the same be quashed.

J. P. Adams.

*Duly sworn to by J. P. Adams. Jurat omitted in printing.*

IN CIRCUIT COURT OF JEFFERSON COUNTY

PLEA IN ABATEMENT OF B. F. McGILL TO SUBSTITUTED AMENDED BILL—Filed September 19, 1942

Comes *B. F.* McGill, named as respondent in the substituted amended Bill of Complaint in this cause, by his solicitors, and appearing specially for the purpose of pleading in abatement and for the purpose of testing the jurisdiction of this Court, and for no other purpose, prays judgment of the Court that the Summons and Bill of Complaint be quashed because he says that he is a resident and citizen of the State of Alabama and a resident and citizen of Mobile County, Alabama; that he is not a resident of Jefferson County, Alabama; that the act or omission complained of in the Bill of Complaint did not occur in Jefferson County, Alabama.

This respondent says further that he is wrongfully joined as a party respondent to the said substituted amended Bill of Complaint; that the same does not state a joint cause of action against him and any other party respondent who might be correctly sued in Jefferson County, Alabama, under the particular type of cause of action attempted to be set up in the said substituted amended Bill of Complaint.

Wherefore, he prays judgment on the said Summons and Bill of Complaint, and that the same be quashed.

[fol. 138] Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for respondent B. F. McGill, appearing specially.

*Duly sworn to by Oliver Brantley. Jurat omitted in printing.*

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IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDED PLEA IN ABATEMENT OF F. B. McGILL TO SUBSTITUTED AMENDED BILL—Filed September 26, 1942

Comes F. B. McGill, named as respondent in the substituted amended Bill of Complaint, and still appearing specially for the purpose of pleading in abatement and for no other purpose, amends his Plea in Abatement heretofore filed in this cause by adding thereto the following affidavit:

STATE OF ALABAMA,
Mobile County:

Before me, A. L. Sclater, Sr., a Notary Public in and for said County and State, personally appeared *B. F.*

McGill, known to me, who first being duly sworn according to law deposes and says that he has read the Plea in Abatement heretofore filed on his behalf in this cause and the allegations of the same are true and correct.

[fol. 139] F. B. McGill.

Sworn to and subscribed before me this 26th day of September, 1942. A. L. Sclater, Sr., Notary Public, Mobile County, Alabama. (Seal.) Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Attorneys for respondent F. B. McGill.

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In Circuit Court of Jefferson County

Minute Entries of Submission on Pleadings—January 11, 1943

On this the 11th day of January, 1943, it is ordered by the Court, that this cause be submitted for a decree on the Plea in Abatement of J. P. Adams and F. B. McGill.

On this the 11th day of January, 1943, it is ordered by the Court that this cause be submitted for a decree on the demurrers of Louisville and Nashville Railroad Company, refiled to substituted amended Bill of Complaint; and demurrers of Brotherhood of Locomotive Firemen and Enginemen, to the substituted amended Bill of Complaint, and demurrers of W. H. Thomas to the substituted amended Bill of Complaint.

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In Circuit Court of Jefferson County

Decree Sustaining Demurrers and Dismissing Bill—April 27, 1943

This Cause coming on to be heard is submitted for decree upon demurrer of respondent, Louisiville & Nashville Railroad Company, refiled to the substituted Bill of Complaint, and demurrer of respondent Brotherhood of Locomotive Firemen and Enginemen to the substitute Bill of Complaint and the demurrer of W. H. Thomas to the substitute Bill of Complaint.

The substitute Bill of Complaint charges a conspiracy among the respondent Railroad Corporation, the Brother-

hood of Locomotive Firemen and Enginemen, its representatives and its several members to fraudulently eliminate from the services of the Railroad the Complainant [fol. 140] and other negro firemen, or to discriminate against them in such a way as to give the white firemen, members of said association, advantage in employment status, rate of pay, etc. While the bill in general terms charges fraud and discrimination against the negro firemen, the specific wrong complained of is that representatives of the Brotherhood of Locomotive Firemen and Enginemen (who were statutory representatives of all firemen) and the respondent Louisville & Nashville Railroad Company entered into an employment agreement February 8, 1941, and modified on May 12, 1941, under the terms of which negro firemen, including the complainant, suffered injury and damage.

From a careful analysis of the Bill it appears that any relief to which plaintiff is entitled must be predicated upon injuries sustained by him from the wrongful execution of the contract of 1941.

The rights allegedly taken away from him by such contract arose from a former contract negotiated for him and others by the same Brotherhood. It is admitted by complainant that the Brotherhood of Locomotive Firemen and Enginemen has the legal right to select bargaining representatives for the entire class. It is also admitted that the universal practice among the railroads of the country is to promote only white firemen to the position of engineer; and that complainant is one of a group of colored firemen who are non-promotable under such practice. No direct relief is here sought against that practice. The contract complained of discloses a plan of operation whereby the number of negro firemen is to be reduced and certain of their privileges under the former contract abridged.

The contract of 1941 appears on its face as one designed to increase the number of promotable firemen. It makes available more men who may be ultimately promoted to the position of engineer. Such plan may have been necessary to the proper operation of the railroad. In any event the Bill fails to negative such necessity or to aver that a contract more favorable to complainant and his class was a practical possibility. The general allegations of fraud and discrimination in the execution of the contract are not

assumed to be true merely because its provisions are not as favorable to the entire group of employees, or a portion thereof, as were the provisions of a former contract. [fol. 141] The Court is therefore of the opinion that the Bill of Complaint contains on equity; that the demurrers should be sustained and Bill of Complaint dismissed. It is therefore,

Ordered, Adjudged and Decreed by the Court that the separate and several demurrers of the respondents, Louisville & Nashville Railroad Company, Brotherhood of Locomotive Firemen and Enginemen, and W. H. Thomas to the substitute Bill of Complaint be and they are hereby separately and severally sustained and said Bill of Complaint is hereby dismissed. Court costs in this cause are hereby taxed against complainant for which let execution issue..

Done and Ordered, this the 27th day of April, 1943.

E. M. Creel, Circuit Judge, In Equity Sitting.

Bond on Appeal for Costs approved and filed May 22, 1943, omitted in printing.

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[fol. 142] In Circuit Court of Jefferson County

Citation of Appeal

To Brotherhood of Locomotive Firemen and Enginemen, an Unincorporated Association, et al., or to Lange, Simpson, Brantley & Robinson, and Harold C. Heiss, Solicitors of Record:

Whereas, on the 22nd day of May, 1943, Bester William Steele took an appeal from the decree rendered on the 27th day of April, 1943, by the Circuit Court of Jefferson County, in the cause of Bester William Steele, against Louisville and Nashville Railroad Company, et al.,

Now, Therefore, you are cited to appear as required by law, before the Supreme Court of Alabama, to defend on said appeal, if you think proper so to do.

Witness my hand this the 24th day of May, 1943.

G. H. Boyd, Register.

Executed this the 25th day of May, 1943, on Lange, Simpson, Brantley and Robinson, by leaving a copy of within with Jim Simpson, Agent.

Holt A. McDowell, Sheriff, Jefferson Co. Ala., by Roy Culver, D. S.

Harold C. Heiss not found in Jefferson County this the 25th day of May, 1943.

Hold A. McDowell, Sheriff, Jefferson Co., Ala., by Roy Culver, D. S.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

CITATION OF APPEAL

To Louisville and Nashville R. R. Company, et al., or to Gibson and Gibson, Solicitors of Record:

Whereas, on the 22nd day of May, 1943, Bester William Steele, took an appeal from the decree rendered on the 27th day of April, 1943 by the Circuit Court of Jefferson County, in the cause of Bester William Steele, against Louisville and Nashville Railroad Company, et al.,

[fol. 143] Now, Therefore, you are cited to appear as required by law, before the Supreme Court of Alabama, to defend on said appeal, if you think proper so to do.

Witness my hand this the 22nd day of May, 1943.

G. H. Boyd, Register.

Executed this the 24th day of May, 1943, by leaving a copy of the within with Gibson & Gibson.

Holt A. McDowell, Sheriff, Jefferson Co., Ala., by Ben L. Ingram, D. S.

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IN CIRCUIT COURT OF JEFFERSON COUNTY

MOTION RE TRANSMITTAL OF EXHIBITS—Filed June 11, 1943

Comes the Appellant, and the separate and several appellees and shows unto the Court as follows:

1st. That a decree sustaining the demurrers and dismissing the Bill of Complaint was rendered in the above entitled cause on the 27th day of April, 1943, and the Complainant, Bester William Steele has filed a security for

costs of appeal to the Supreme Court, all of which appears of record in this Court.

2nd. That there was attached to the substituted amended Complaint Exhibit Number One, which is a small book entitled "Agreement between the Louisville & Nashville Railroad, and its Locomotive Firemen and Hostlers in accord with Mediation Agreement, Arbitration Award, and Supplementary Agreement,"—also attached to Amendment to the amended Bill of Complaint is Complainant's Exhibit "AA", which is a small book entitled "Agreement between the Louisville & Nashville Railroad and its Locomotive Firemen and Hostlers in accord with Mediation Agreement, Arbitration Award, and Supplementary Agreement," and upon investigation of the above exhibits it has been concluded that in view of the particular character of these respective exhibits, it is necessary that the original exhibits be transmitted to the Clerk of the Supreme Court in order that same may be personally inspected by the Judges of the said Court.

Wherefore, the premises considered, the respondent prays that this Court order the Register to send the Exhibits hereinabove referred to with the proper certificate attached, to the Clerk of the Supreme Court, and that the same be considered a part of the original Supreme Court record.

[fol. 144] This the 11th day of June, 1943.

Arthur D. Shores, Solicitor for Appellant; Chas. H. Eyster & White E. Gibson, Solicitors for L. & N. R. R. Co.; Lange, Simpson, Brantley & Robinson, Solicitors for Brotherhood, L. F. & E.

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IN CIRCUIT COURT OF JEFFERSON COUNTY,

ORDER RE TRANSMITTAL OF EXHIBITS—June 23, 1943

Upon consideration of the foregoing motion of the parties in this cause, to have certain Exhibits described in said Motion transmitted to the Supreme Court for its inspection, coming on to be heard, and the same having been considered and understood by the Court, it is Ordered, Adjudged and Decreed by the Court that the Register send to the Clerk of the Supreme Court the Complainant's Exhibit "AA", and

complain-t's Exhibit Number One, in order that said exhibits may be personally inspected by the Judges of said Court.

Done and Ordered, this the 23rd day of June, 1943.

J. Russell McElroy, Circuit Judge. In Equity Sitting.

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[fol. 145] In Circuit Court of Jefferson County

Certificate of the Register Re-Appeal and Record—June 24, 1943

I, G. H. Boyd, Register of the Circuit Court, Tenth Judicial Circuit of Alabama, in Equity, do hereby certify that the Complainant, Bester William Steele, in a cause pending in said Court wherein Bester William Steele is the Complainant, and Louisville And Nashville Railroad Company, Brotherhood Of Locomotive Firemen And Enginemen, an unincorporated Association, et al., are the Respondents, has taken an appeal from the Decree of said Court rendered on the 27th day of April, 1943, to the Supreme Court of Alabama.

And I do further certify that said appeal was taken on the 22nd day of May, 1943, and is returnable to the present term of the said Supreme Court.

And I do further certify that the for-going pages numbered from One (1) to One Hundred twenty-three (123), both inclusive, contains a full, true correct and complete transcript of the record and all proceedings in said cause and a copy of the security for costs of appeal to Supreme Court.

Witness my hand and seal of office, this the 24th day of June, 1943.

J. H. Boyd, Register.

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[fol. 146] In Supreme Court of Alabama

[Title omitted]

Assignments of Error

Comes the appellant and says there is manifest error in the record, in this:

1. The court erred in sustaining the separate and several demurrers of respondent, Louisville & Nashville Railroad

Company to petitioners substitute Bill of Complaint, as is shown on page 120 of the transcript.

2. The court erred in sustaining the separate and several demurrers of respondent Brotherhood of Locomotive Firemen & Enginemen to petitioner's substitute Bill of Complaint as is shown on page 120 of the transcript.

3. The court erred in sustaining the demurrers of respondent, W. H. Thomas to petitioner substitute Bill of Complaint as shown on page 120 of the transcript.

4. The court erred in dismissing the petitioners substitute Bill of Complaint as is shown on page 120 of the transcript.

Arthur D. Shores, Solicitor of Complainant.

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[fol. 147] IN THE SUPREME COURT OF ALABAMA

BESTER WILLIAM STEELE

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, et al.

MINUTE ENTRIES OF ARGUMENT AND SUBMISSION—November 23, 1943

Come the parties by attorneys, and the argument in this cause having been begun, but not concluded, the cause is passed to Wednesday, November 24th, 1943, at 10 o'clock, A. M.

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[fol. 148] [Title omitted]

(November 24, 1943)

Come the parties by attorneys, and the argument in this cause having been concluded, the cause is submitted for decision.

[fol. 149] IN THE SUPREME COURT OF ALABAMA

6 Div. 153

BESTER WILLIAM STEELE

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, etc., et al.

DECREE—January 13, 1949

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered and ordered that the decree of the Circuit Court be in all things affirmed.

It is also considered and ordered that the Appellant, Bester William Steele, and Fidelity and Deposit Company of Maryland, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, let execution issue accordingly.

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[fol. 150] IN THE SUPREME COURT OF ALABAMA.

BESTER WILLIAM STEELE

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association, et al.

Appeal from Jefferson Circuit Court, in Equity

OPINION

GARDNER, Chief Justice:

Complainant Steele filed this bill against the Louisville & Nashville Railroad Company, a corporation, the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, and named individuals connected with

the latter association. To the bill as last amended, which in fact is a substitute for the original bill, demurrers of the several defendants were sustained and the bill dismissed. [fol. 151] From this decree the complainant prosecutes this appeal.

The argument of counsel for the respective parties has assumed a rather wide range, but we think the discussion here may be brought within a narrow compass. Omitting any detailed recital of the bill's averments, the salient facts are as follows:

Complainant is a Negro fireman, in the employ of the Louisville & Nashville Railroad since 1910, competent and rendering satisfactory service. Prior to the passage of the Railway Labor Act, and down to April 8, 1941, he had been serving as a fireman on a passenger train, assigned to what is known as the "South End Passenger Pool." This was a highly preferable job for a fireman. On April 1st, 1941, the jobs of this particular pool were bulletined for "bidding in" because the number of firemen in the pool had to be reduced due to reduction in mileage, but by virtue of a contract entered into between the defendant Railroad and the Brotherhood of Locomotive Firemen and Enginemen in February, 1941, subsequently modified in May, 1941, complainant was thrown out of work for a period of sixteen days (April 8th to April 24th, 1941), and firemen who were members of the Brotherhood given the preference. On April 25th, 1941, he was given a job on a local freight run, less desirable as to the character of work and less remunerative. In December following, he was placed as fireman on a switch engine, and worked in that capacity until January 3, 1942, when he was re-assigned to his original place in the South End Passenger Pool.

Negro firemen are ineligible to membership in the defendant Brotherhood. Negroes are not employed on rail- [fol. 152] roads as locomotive firemen except in the South. On the defendant Railroad there are four seniority districts, known as the South and North Alabama Division, the Montgomery and Mobile Division, the Mobile and New Orleans Division, and the Pensacola Division. On these four divisions Negro firemen are in the majority, but constitute a minority of the total number of firemen employed by the defendant Road. The Negro firemen and the Brotherhood firemen together comprise the entire craft or class

of firemen employed by the Railroad. The defendant Brotherhood is the representative of the entire craft or class of firemen with the defendant Road, and is so accepted by complainant and the other Negro firemen. Complainant's employment is individual, and he asserts no seniority rights by virtue of any individual contract with the defendant Road.

As we understand the bill, with its exhibits, complainant's claim for seniority rights arose out of the agreement entered into between the defendant Road and the Locomotive Firemen and Hostlers on March 1st, 1929. This agreement contains express stipulation that "the rates, rules, and working conditions as provided herein, shall be continued in effect, subject to 30 days' written notice by either party." Subsequently, as above noted, the defendant Brotherhood, under the Railway Labor Act, became the representative for the entire craft of firemen, and entered into an agreement with the defendant Road which considerably curtailed seniority rights of complainant, and which gave ground for the selection of others, members of the Brotherhood, in his stead.

It further appears from the bill that locomotive engineers are obtained by promotion of selected white locomotive firemen. This is the existing railroad practice in the United [fol. 153] States. To quote from the bill: "By traditional and universal railroad practice in the United States Negro firemen arbitrarily are never promoted to engineers regardless of knowledge, experience, competency, and worth." The bill further shows, to distinguish between white firemen as a class and Negro firemen as a class, the white firemen are known under standard railroad practice as "promotable men" while the Negro firemen are known as "non-promotable men."

On March 28th, 1940, the defendant Brotherhood gave due notice to the various railroads involved, including this defendant Road, of a request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers. This change in the previous agreement brought about the restrictions to non-promotable firemen and privileges to promotable firemen which worked to complainant's disadvantage as indicated. This was in March, 1940, and the formal agreement was entered into nearly a year thereafter in February, 1941.

The bill seeks injunctive relief against the enforcement of this agreement, which, as we view it, is in effect a bill for the specific performance of the agreement of March, 1929. *Hewitt* v. *Magic City Furniture Co.*, 214 Ala. 265, 107 So. 745, 44 A. L. R. 1441; *Donovan* v. *Travers*, 285 Mass. 167.

In substance and effect the present bill appears to be the same as that presented by counsel for complainant here to the District Court of the United States for the Western District of Tennessee, which was disposed of upon the theory that no Federal question was properly presented. *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, 127 F. (2d) 53.

[fol. 154] The recent cases of *Switchmen's Union* v. *National Mediation Board*, 88 L. Ed. 89; *General Committee, Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.*, 88 L. Ed. 104; and *General Committee, Brotherhood of Locomotive Engineers* v. *Southern Pacific Co.*, 88 L. Ed. 112, have been called to our attention, but we are persuaded that the Court was dealing only with the matter of the question of representation, and these authorities are here considered of no controlling importance.

Reverting to *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, supra, we may add that the Court in its opinion refers to the fact that in the last analysis complainant's seniority rights must rest upon contract, and that so far as the Fifth Amendment is concerned, it *relatives* only to governmental action and not to action by private persons. This observation should suffice, without further elaboration, as an answer to the constitutional question argued in brief.

So far as concerns the defendant Railroad, it has been definitely determined that the Railway Labor Act (Title 45 U. S. C. A. Sec. 151-188) placed a mandatory duty upon the Railroad to treat with the representative of the employees and with that representative only. *Virginian Railway* v. *Federation*, 300 U. S. 515. And for a willful failure, a rather heavy penalty is imposed. And under Sec. 152, Title 45 U. S. C. A., it is provided that the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes therein named. In *Virginian Railway* v. *Federation*, supra, it was pointed out in the opinion that the act

did not purport to preclude individual contracts which the Railroad may elect to make directly with individual employees. "It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat [fol. 155] with no other." See also 31 Am. Jr. page 899. Speaking as to the purpose of the Act in the Virginia Railway case, the court further observed: "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern." In the instant case the Brotherhood was the true representative, with which the Railroad was under duty to confer and negotiate.

In *Shaup* v. *Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327, we made reference to the seniority rights which arose by virtue of the agreement between the Brotherhood and the Railroad, subject to be vacated just as were complainant's seniority rights under the 1929 agreement, where we observed that such a right was somewhat intangible and could not be denominated a vested property right. We indicated, however, that an unlawful invasion or interference therewith by a third person would constitute a wrong of which the courts would take cognizance; citing *U. S. Fidelity Co.* v. *Millonas*, 206 Ala. 147, 89 So. 732, 29 A. L. R. 520. They cannot be vested property rights in the true sense, for the simple reason that they are subject to be modified or taken away entirely upon due notice, in accordance with the very terms of the contract.

As we have observed, the bill admits that complainant recognizes the defendant Brotherhood as its representative for collective bargaining with the Railroad. The Brotherhood, therefore, had a right to enter into the agreement of February, 1941, which modified to complainant's detriment [fol. 156] the agreement of 1929. In *Hartley* v. *Brotherhood of Ry. & S. S. Clerks, etc.*, 277 N. W. 885, The Supreme Court of Michigan, speaking of these collective bargaining agreements, referred to the fact that the complainant's seniority rights in that case were not acquired by virtue of any contract of employment with her employer, but by reason of the bargaining agreement, and this agreement was executed for all the members of the Brotherhood and not

for the individual benefit of the plaintiff. The Court observed:

> "When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members."

A like line of reasoning was followed by the North Carolina Court in *Coley* v. *Atlantic Coast Line R. R.*, 19 S. E. (2d) 124. See also *O'Keefe* v. *Local 463*, 117 A. L. R. 817; *Cameron* v. *International Alliance*, 97 A. L. R. 594; 31 Am. Jur. p. 896-899; note to *Louisville & Nashville Railway Co.* v. *Miller*, 142 A. L. R. 1050; note to *Piercy* v. *Louisville & Nashville Railway Co.*, 33 A. L. R. 322. The author of the note as found in 142 A. L. R. on page 1059, in speaking of the nature of seniority rights, observed: "As a starting point, the courts are apt to observe that seniority is not an inherent, natural, or constitutional right, and does not arise from mere employment, independently of contract, but exists by virtue of the contract between the employer and the union, inuring through the latter to the benefit of the members." Guided by these well-recognized principles, it [fol. 157] is clear enough complainant must be held to abide by the contract made with his recognized statutory representative.

In referring to the Brotherhood as complainant's representative, we mean to indicate a representative in a limited sense only. Indeed, the Massachusetts Court in *Donovan* v. *Travers*, supra, reached the conclusion that in no correct sense was the union an agent, but a principal. However that may be, to our mind it seems entirely clear that Congress, in providing for collective bargaining by representative of a craft or class, had no intention of creating a confidential relationship of principal and agent, such as would place a duty upon the agent to give notice to every employee of any action which might unfavorably affect him, and to make a due account for his actions, and be subject to liability for failing to so account.

Complainant appears to rest his case largely upon the doctrine of such confidential relationship; citing *Brasher v. First National Bank*, 232 Ala. 340, 168 So. 42; *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71, where the exacting duties of such an agency are pointed out. But we think the Railway Labor Act merely intended that there be designated a representative chosen by the majority of the craft or class of employees to treat with the Railroad in regard to rates of pay, working conditions, and the like, and to bargain with reference to the whole without any notion of liability to the individual. See also *System Federation v. Louisiana & A. Ry. Co.*, 119 F. (2d) 509; *System Federation v. Louisiana & A. Ry. Co.*, 32 F. Supp. 89.

As to the Railroad Company, the complaint rests upon a charge of conspiracy between the Road and the Brotherhood to defraud complainant of his seniority rights. Of course, the charge of conspiracy or fraud in general terms [fol. 158] is insufficient. Facts must be alleged which would justify the legal conclusion of an unlawful conspiracy. "The illegal purpose or means, which the conspirators meant to accomplish or to resort to, must be described accurately, for unless the object is illegal, or the means agreed upon illegal, there is no actionable wrong." *National Park Bank v. L. & N. R. R.* 199 Ala. 192, 74 So. 69.

When the facts alleged are considered, we think it clear enough no unlawful conspiracy is charged against the Railroad. As we have previously observed, the Road was under statutory duty, mandatory in character, to deal with the representative of the craft. True, the complainant, as a Negro fireman, is ineligible to membership in the defendant Brotherhood, but as observed by the New Jersey Court in *Cameron v. International Alliance*, *supra*:

> "Trade union membership, like other contractual relationships, is purely voluntary on both sides. Such organizations come into being for purposes mutually agreed upon. The cohesive force is the common interest. Their right to prescribe qualifications for membership, and to make rules and regulations for the transaction of their lawful business, is not open to question. They may impose such requirements for admission and such formalities of election as may be deemed fit and proper; they may restrict membership to the original promoters, or limit the number to be

thereafter admitted; the power of such a body to make its membership exclusive is incident to its character. * * * Enforced admission to membership is manifestly contrary to the scheme of such a society. No person has an abstract or absolute right to such membership."

This principle was likewise recognized by this Court in the recent case of *Chapman v. American Legion*, — Ala. —, 14 So. (2d) 225, 147 A. L. R. 585, in which latter citation many authorities are to be found in the note.

Like thought was expressed in the separate concurring opinion to be found in *Brotherhood of Railway & S. S. Clerks v. U. T. S. E. A.*, 137 F. (2d) 817, where it was said: "That the rules of the Brotherhood make Negroes ineligible to membership is not a matter which concerns us." Counsel for complainant place much stress upon this authority. That case involved "red caps" who were ineligible to membership in the Brotherhood, but who insisted that the Brotherhood should not be considered their representative, and that they were entitled to one of their own choosing. The Mediation Board, however, considering that they were represented by the Brotherhood, denied their application for separate representation. The United States Circuit Court of Appeals for the District of Columbia held, in effect, that the finding of the Mediation Board was errone- [fol. 159] ous as a matter of law, and the judgment of the District Court setting aside the order was affirmed.

As we gather from the opinion of the Court of Appeals, the Mediation Board had held that these employees were in fact merely a minority group of an established craft or class that did have representation. This opinion of the Court of Appeals was reversed by the Supreme Court of the United States without opinion. *Brotherhood of Railway etc. Employees v. United Transport Service Employees*, 88 L. Ed. 153. Perhaps the reversal was rested upon the principle held decisive in *Switchmen's Union v. National Mediation Board; General Committee, Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*; and *General Committee, Brotherhood of Locomotive Engineers v. Southern Pacific Co.*, *supra*, to the effect that the courts will decline to review the action of the Mediation Board in the matter of representation under the Railway Labor Act. However this may be, we think

clearly the reversal could also have been rested upon the theory, as outlined by the Mediation Board, that the "red caps" were already represented, and that the case merely presented a complaint on the part of a minority of the craft or class who were disappointed with the representative the majority had selected.

In any event, the instant case is much stronger for the defendants. Here there is no question of representation. The bill discloses upon its face that the Brotherhood has been delegated as representative under the Railway Labor Act as representative of the craft or class to which complainant belongs, and has been so acting and so recognized as the representative for many years.

In *Washington Termianl Co. v. Boswell*, 124 F. (2d) 235, is found a comprehensive review of the Railway Labor Act. It was designed, as stated in the opinion, "not to outlaw the right to strike, but merely to prevent the necessity for its exercise." And in *Virginia Railway v. Federation, supra*, the Court noted the fact that in this Act more is involved than the settlement of a private controversy without appreciable consequences to the public. "The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern."

[fol. 160] Considering, therefore, the situation as thus presented to the Railroad, the question at once occurs to a practical mind: What step was the Road to take? The representative of the craft, the Brotherhood, had made a request for a modification of the existing contract concerning seniority rights. Was it the duty of the Road to combat the representative and enter into an argument as to its resultant effect upon employees who were in the minority? The operation of a railroad presents many complex problems. Among the most serious are those involving its relationship with its employees, as well as with the public at large, and their responsibilities as to the safety of the travelling public. It requires not only skill in management and in the actual operation by the employees, but it requires cooperation among the employees, as well as with the management. There was nothing hasty in the acceptance of the Brotherhood's proposal. Nearly a year had passed from the time the request was made until its final acceptance.

The Railway Labor Act was careful to preserve to the individual employee the right of conference with the management, either individually or through a local representative of the employees. Sec. 152, Title 45 U. S. C. A., supra. There was no requirement, either in the Act or in the rules or regulations of the Brotherhood, which called for notice to the individual employee of a change in the contract.

The defendant Road had all these complex matters for consideration. As we have previously noted, the bill discloses a traditional policy of the railroads throughout the country to promote to the position of engineer white firemen only. This means, of course, that such course had been considered by the management as wise and proper throughout the history of the railroads in America. Complainant has long been in the service, and knew of this unbroken custom. He therefore knew that he would not be eligible for promotion to the position of engineer. So uniform a custom, therefore, recognized in the practical construction of his contract of employment, must be considered as a part thereof. *City of Greenville v. Greenville Water Works*, 125 Ala. 625, 27 So. 764; *Bixby-Thiesen Co. v. Evans*, 174 Ala. 571, 57 So. 39; *Birmingham Water Works Co. v. Hernandez*, 196 Ala. 438, 71 So. 443; *Mitau v. Roddan*, 149 Cal. 1.

[fol. 161] It is, of course, necessary that the engineer be promoted from his position of fireman; but practical considerations also require he likewise have had, as fireman, experience over the run to which he is likely to be promoted to engineer. This modified contract of which complainant complains was in harmony with the Railroad's policy, and lends support to its theory of operating successfully a great transportation system. As was said in *Washington Terminal Co. v. Boswell*, supra, the railroad still "has the power of management." Freedom of individual enterprise is regarded as one of the cornerstones of our form of government. This freedom, under the police power, is subject to many restrictions for the public good, recognized in innumerable decisions following legislation to that end. Such freedom of enterprise is restricted as to the railroads in instances too numerous to mention, among them the Railway Labor Act. But no act of Congress has yet been enacted which interferes with the management of the Road insofar as the question of the selection of its individual employees is concerned. If the Road considers it wiser to

continue the policy of having only white engineers, there is no more a law standing in the way of the exercise of this freedom of choice than there is in the choice of the Brotherhood of its membership. And it is clear enough the courts have no power to declare otherwise or to dictate a different policy.

In *Plessy v. Ferguson*, 163 U. S. 537, many observations were made concerning laws relating to the separation of races. That it is a question of much delicacy, history teaches and all men know. In the Plessy case, supra, the Court said:

> "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced. * * * In determining the question of reasonableness it is at liberty to act with reference to the established usages, [fol. 162] customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. * * *
>
> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."

Considering, therefore, the averments of fact, the bill merely discloses that the Road has signed an agreement with the Brotherhood, the representative of the entire craft, which in fact is in harmony with its traditional policy. The Railroad, in entering into this agreement, did nothing illegal and pursued no illegal means. As a consequence, it was guilty of no actionable wrong. *National Park Bank v. L. & N. R. R.*, *supra*. This conclusion makes it clear the complainant is entitled to no specific performance of the con-

tract of 1929 by mandatory injunction against the agreement of 1941.

The same rule of law concerning the necessity for charging facts to show a conspiracy is applicable to the charge of fraud, as against the Brotherhood and the individual defendants. Fraud is never presumed, and the facts upon which the charge is based must be clearly stated. *Winn v. Winn*, 242 Ala 324, 6 So. (2d) 401; *Birmingham Trust & Savings Co. v. Shelton*, 231 Ala. 62, 163 So. 593; *Broom v. Douglas*, 175 Ala. 268, 57 So. 860; 24 Am. Jur. p. 88.

Certainly the management of the Railroad has as much right to take into consideration this delicate problem as does the law-making body of any state in passing laws looking to the peace and good order of society. The very object of the Railway Labor Act was to provide for the public safety an uninterrupted transportation system.

We think a consideration of the facts alleged as to the Brotherhood leads to the same conclusion we have arrived at concerning the defendant Railroad. In substance and effect complainant's case is rested against the Brotherhood upon the theory that it was under a duty to give the minority employees, non-members of the Brotherhood, notice of any action to be taken which would in any manner detrimentally [fol. 163] affect their seniority rights. We have expressed our view that no such duty rested upon it. So considered, therefore, the charge of fraud amounts largely merely to an accusation that the Brotherhood is looking largely to the interests of its own membership to the detriment of complainant. Even should this be conceded, yet at the same time the action of the Brotherhood looks to the welfare of the majority of the craft, and has the same basic foundation that underlies the Road management. It looks to a compliance with the traditional custom of the Road to have only white engineers. There is no charge of bad faith or malice against the complainant or any of his class. 117 A. L. R. 823. The charge is, that by entering into this latter agreement, which, as we have observed, is in line with the policy of the Railroad management, the Brotherhood has fraudulently disrupted complainant's seniority rights. True, complainant in this particular case does not seek to be placed in the promotable class; that is, he does not seek to be declared in this suit eligible for the position of engineer. But our previous discussion discloses that a recognition of the principles for which he contends here will ulti-

mately lead to that end. If the Brotherhood is his confidential agent, and must look to his interest, it must look to his promotion in the final analysis. Complainant is in the minority group of his craft, and if he suffers any hardship, it is due to the fact of control of the majority, which can in no event be considered as a fraud, either in law or fact.

There are numerous instances where individual hardships have been suffered for the good of the whole. The New York Court in *O'Keefe v. Local 463*, 117 A. L. R. 817, speaking to this question, said:

> "The question presented upon the appeal is whether under its constitution and by-laws the union has power and right to take action reasonably calculated to advance its objects, even through such action involves interference with the employment of a member who has committed no wrong and against whom no charges have been preferred. This Court has frequently sustained the right of labor unions to interfere by lawful means between an employer and his employees who are not members of the union where the purpose of such interference is solely to advance the interest of [fol. 164] the members of the union. We have not been oblivious of the consequent hardship imposed, at times, upon individual employers or employees, but for hardship to the individual resulting from action reasonably calculated to achieve a lawful end by lawful means the Court can give no redress. * * * The objects sought by a union and the "unity of action" to achieve them cannot be attained without some harm to the individual."

Another illustration is to be found in the Massachusetts case of *Minasian* v. *Osborne*, 37 L. R. A. NS 179, where a son lost employment for the reason that he had his father as a helper. And another, involving the loss of employment by a married woman, is found stated in *Hartley* v. *Brotherhood of Ry. & S.S. Clerks*, supra. The Court observed in this latter case: "The Brotherhood had the power by agreement with the Railroad to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members." Congress has made no effort to control the matter of seniority rights. It has left that to contract between the parties. That contract has been entered into which detrimentally

affects complainant's seniority rights, but it was made by his representative, and it is in conformity with the uniform and traditional practice of the Road. It is a lawful contract entered into a lawful manner, and the facts alleged fail to show any conduct on the part of the Brotherhood that creates in complainant an actionable wrong.

In the discussion of this case we have left to one side many questions presented by the demurrer and argued by counsel for defendants, some of which may give rise to serious consideration.

The Shaup case, supra, involved no attempt to charge fraud or bad faith, and the weight of authority decidedly supports the view there taken. *Grand Int. Brotherhood of Locomotive Engineers* v. *Mills* 31 Pac. (2d) 971. There are numerous authorities, however, tending to support the view that a court of equity will lend its aid in protection of seniority rights which are fraudulently and illegally interfered with. 142 A. L. R. 1067. This question, as well as all [fol. 165] others, becomes one of secondary consideration in view of the conclusion reached that the bill states no cause of action in any form. We, therefore, prefer to rest our decision upon the fundamental meritorious question sought to be presented.

We are at the conclusion, therefore, that the demurrer was properly sustained and the decree appealed from is due to be affirmed. It is so ordered.

Affirmed.

All the Justices concur.

[fol. 166] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

MOTION FOR STAY OF EXECUTION—Filed Jan. 29, 1944

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Comes the appellant, Bester William Steele, by his attorney with consent of the Court first had and obtained moves the Court to grant an extension of time of sixty days

before the execution of the Writ of Fieri Facias in the above styled case, and for grounds of said motion sets down and assigns the following:

1. That additional time is needed to enable Petitioner to apply for, to obtain and perfect a Writ of Certiorari in the Supreme Court of the United States.

Signed: Arthur D. Shores, Attorney for the Appelant.

I hereby certify that I have this day mailed a copy of the foregoing motion to the Honorable James Simpson, Solicitor for Brotherhood of Locomotive Firemen and Enginemen and W. H. Thomas; and White Gibson, Solicitor for the Louisville and Nashville Railroad, whose proper Post Office addresses are, Birmingham, Alabama, this 24th day of January, 1944.

Signed: Arthur D. Shores, Attorney for the Appellant.

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[fol. 167] IN THE SUPREME COURT OF ALABAMA

[Title omitted]

ORDER STAYING EXECUTION—Jan. 29, 1944

Upon consideration of the petition of Appellant, Bester William Steele, this day filed, it is ordered that the petition be and the same is hereby granted, and the execution of the judgment rendered by this Court on January 13th, 1944, in the above styled cause be and the same is hereby stayed for 60 days, to enable petitioner to apply for, obtain and perfect a Writ of Certiorari in the Supreme Court of the United States.

It is further ordered, if the Petition for the Writ of Certiorari is filed in the Supreme Court of the United States within the said 60 days, that said stay remain in force and effect until said cause is disposed of by the Supreme Court of the United States.

[fol. 168] COMPLAINANT'S EXHIBIT "AA"

Agreement Between the Louisville & Nashville Railroad and Its Locomotive Firemen and Hostlers in Accord with Mediation Agreement, Effective March 31, 1927, Arbitration Award, Effective May 1, 1927, and Supplementary Agreement, Effective March 1, 1929

Issued March 1, 1929

[fol. 168-1] Article 25

Assignments and Pool Service, Regulating Mileage, Etc.

1. When assigned to regular runs they will not be required to perform other service, that they do not stand to protect, except in cases of emergency, and when so used, [fol. 168-2] will be notified, as far as possible, in time to get proper rest.

2. When assigned to regular runs and held off to perform special service they will be paid not less than the amount they would have earned had they remained on their regular runs. (This not to apply to men in freight service, designated to do extra passenger work.)

3. When on regularly assigned runs they will fill their runs regardless of the engine used. This to apply to cases of changing or cutting out engines on line of road unless special instructions are issued to the contrary.

4. Those assigned to first pool will handle the unassigned freight service and fill vacancies in fast freight and passenger service, as provided for in Sections 17, 18 and 19 of Article 26, and such other work as may be designated.

5(a). When not assigned to regular runs they will be run first in first out in class of service assigned. Under the first in first out rule, men in the same class of service will take their turns out in accordance with their arrival at the terminal yard board as shown on the roundhouse register.

(b) When a man used in yard service is relieved after a man in road service passes the yard limit board, but before he registers in at the roundhouse, or where both register in at the same time, the man used in yard service will

stand first out as between them. This applies also to firemen relieved from hostling service.

6. In case of doubleheading, men assigned to regular runs will be used on head engine; where doubleheading in pool service, the man standing first out will be used on head engine. When engines are cut out between terminals, the man on the head engine will be considered in charge of the train and remain on the head engine regardless of engines [fol. 168-3] used. When engines are cut in between terminals, the man in charge of the train will take the head engine.

7. Men holding permanent assignments which they secured by seniority wishing to voluntarily surrender same will be required to give ten (10) days notice, remaining on run or job, unless they lay off, until rebulletined.

8. The time set for departure of the train upon which men are to be used in service, or upon which they are to deadhead, will govern as to how they will be run out, (preparatory time not to be taken into consideration).

When two or more men in the same class of service are to be used, the following will govern, subject to Section 8:

8 (a). When two men are called to depart at the same time, one for a road trip; the other for a yard engine, the man first out will be used for the road trip, and the man second out for the yard engine.

(b) When two men are called to depart at the same time, one in passenger service, the other in freight service, the man first out will be used in passenger service.

(c) When two men are called to depart in road service at the same time, on different trains, one to perform service and the other to deadhead, the man first out will be used to deadhead and the man second out will be used on the service trip.

(d) When two men are called for the same train, one to handle the train, the other to deadhead, the man first out will handle the train, the other deadhead.

(e) When two or more men in the same class of service are to deadhead on the same train, they will be handled in the following order:

1. To an intermediate point for return service to the home terminal:

[fol. 168-4] Note—Where more than one man is deadheaded for such service, the man first out will be deadheaded to the nearest point; the man second out to the next nearest point, and so on. If deadheaded to the same point, they will take their turns out in the order they stood when called.

2. To the away-from-home terminal, or for service to the away-from-home terminal:

Note—When two or more men start deadheading on the same train en route to the opposite terminal, but one or more of them are cut out at an intermediate point to perform service to the opposite terminal, the man last out will be cut out at the first point; the man next out at the second point, and so on.

3. For service at, or between intermediate points:

Note—Where more than one man is deadheaded for such service, the man first out will be deadheaded to the nearest point, the man second out to the next nearest point, and so on. If deadheaded to the same point they will take their turns out in the order they stood when called. Should they go on duty at the same time, the man who stood first out will have the preference of runs.

4. When one man is to be deadheaded from the away-from-home terminal to the home terminal, and another to an intermediate point, the man first out will be deadheaded to the home terminal. If more than one men is to be deadheaded to intermediate points, the man first out will be deadheaded to the nearest point, the man second out to the next nearest point, and so on.

(f) When two or more men are doubleheaded or deadheaded through to the opposite terminal, they will take their turns out in the same position that they were in when called.

[fol. 168-5] (g) When a man deadheads in from an intermediate point, the man pulling the train will be considered first out.

(h) When two or more men deadhead in from an intermediate point on the same train, they will take their turns

out as per Article 25, Section 5, of the General Agreement, as between themselves, according to the time relieved from the last service performed, but behind men who may have deadheaded through from the initial terminal on the same train, this information to be shown on register.

9. (a) When men assigned to the same class of service are doubleheaded on the same train and one engine or man is to be cut out at an intermediate point, the man who stood second out will be cut out and the man who was first out will handle the train through, as the case may be, to the terminal regardless of engine used.

(b) When men on runs to which they are assigned, or in the class of service they stand to protect, have engine failures on line of road and a relief engine is sent in charge of a second pool man, the man in charge of the run will change engines and complete the trip, the second pool man taking charge of the disabled engine; when for any cause, a first pool man is used to take a relief engine to take the place of a disabled engine of a train in charge of another first pool man, they will not change engines but the man in charge of the relief engine will complete the trip and the man in charge of the disabled engine will remain with his engine.

10. Firemen will be assigned to regular jobs in yard service by bulletin regardless of engine used.

11. When bulletining yard jobs they will show, as far as possible, the nature of the work, district and number of days per week to be worked, and will be used, so far as practicable, in the district and on the work to which assigned.

[fol. 168-6] 12. When assigned to jobs bulletined to work a certain number of days per week and annulled for four successive days or four days in the aggregate in a thirty-day period, or when engines are worked as much as four days more than provided for during a thirty-day period, they will be considered as new jobs and rebulletined accordingly.

13. Jobs to which one or more men are assigned will only be rebulletined when the time for going to work or being relieved has been changed as much as two hours as

long as worked in the same district or terminal. Where the point for going on duty or being relieved is changed as much as one-half mile, such jobs will be rebulletined. When extra jobs are worked as much as six consecutive days, they will be considered regular assignments and be bulletined accordingly.

14. Where new jobs are created, or a second crew assigned to a job to which only one crew has been assigned, such new job or second shift will be bulletined.

15. Men displaced on account of their jobs being rebulletined, under the above rules, will have the right of a displaced man to claim any job the seniority rule entitles them to.

16. (a) Those assigned to second pool will be used to fill vacancies of first pool men, assigned runs not otherwise provided for and such other work as may be designated.

(b) When a first pool man is used to fill a vacancy in assigned passenger service, the vacancy should be left in first pool board, to be filled by second pool man.

(c) When first pool men are used to doublehead regular passenger trains or to handle extra passenger trains, including extra sections, officers specials, troop trains, etc., this will be considered as regular first pool work and there will be no vacancies left on the board.

[fol. 168-7] 17. When firemen are needed for extra service operating out of points where pool or extra crews are not carried, men will be deadheaded from terminal where second pool or extra boards are maintained.

18. (a) When a first pool man is laying off and reports for duty, he will take his turn, if on the board. If his turn is out, he will take the turn of the man representing him on arrival if within 36 hours from the time he departed. If the turn does not arrive within 36 hours he may take the register at that time.

(b) Men who report for duty and lay off again before performing any service on their runs or jobs will not be considered as having reported for duty. The man who is filling the vacancy and entitled to hold same under the Agreement will be continued in the vacancy just the same as though the regular man had not reported, unless he is

called for other service in the meantime, in which case the vacancy will be refilled as if a new vacancy. (This, however, would not break the continuity of the vacancy.)

(c) First pool men who have been filling vacancies in other service, returning after being held out of service to attend court or investigations, or deadheading in under pay or by necessity, etc., will take their turns according to the register.

For rule for handling of pool crews held out of service at away-from-home terminals to attend investigations, see Article 31.

19. Those assigned to second pool, whether reporting for work after being off for any cause or coming in off a run, except where filling vacancies of ten days or more, will take their turn according to the register.

20. When a first pool man is used for service that a second pool man stands to protect on account of there being no second pool man available, it will not be considered as creating a vacancy in the first pool for forty-eight hours, and second pool man will not, therefore, be used to fill the va- [fol. 168-8] cancy until after the expiration of forty-eight hours. Under such circumstances when a first pool man is used to protect second pool work on work trains or outlying runs he will be relieved at his request by second pool man as soon as possible, with the understanding that no extra or additional expense for deadheading will be incurred under such circumstances.

21. When a vacancy becomes first out in the first pool, and there is no second pool man to fill it at the time the train is ordered, the vacancy will be left first out until there is an available man to fill it, first pool men running around same.

22. When conditions do not justify the operation of first and second pool, the second pool may be abolished by mutual agreement between the division officers and the local chairman.

23. When practicable they will not be required to make more than one turn-around trip out of the away-from-home terminal without being run through to their home terminal.

24. (a) In regular and extra passenger service a sufficient number of engineers and firemen will be assigned to keep the average mileage, or equivalent thereof, between 4,000 and 4,800 miles per month.

(b) In assigned pool or chain gang freight, or other service paying freight rates, a sufficient number of engineers and firemen will be assigned to keep the average mileage, or equivalent thereof, between 3,200 and 3,800 miles per month.

(c) On road extra lists a sufficient number of engineers and firemen will be maintained to keep the average mileage, or equivalent thereof, between 2,600 and 3,800 miles per month; provided that when men are cut off the working lists and it is shown that those on the extra lists are averaging the equivalent of 3,100 miles per month, men will be [fol. 168-9] returned to the extra lists if the addition will not reduce the average mileage, or equivalent thereof, below 2,600 miles per month.

(d) In assigned yard service, regulation will be made by requiring each regularly assigned man to lay off when he has earned the equivalent of 35 days per month.

(e) In extra yard service, a sufficient number of engineers and firemen will be maintained to keep the average earnings between 26 and 35 days per month; provided, when men are cut off the lists and it is shown that men are averaging the equivalent of 31 days per month, men will be returned to service, if the addition will not reduce the average earnings below 26 days per month.

(f) Local Chairmen of both organizations will be furnished record of the earnings of engineers and firemen in the first and second pools and yard extra lists each fifteen (15) day period, and of regularly assigned engineers and firemen each thirty (30) day period. Regulations of lists will be made according to those periods except where local agreements provide otherwise for either engineers or firemen, in which event record of earnings will be furnished for the period agreed upon.

(g) Should an engineer or fireman make the maximum mileage as prescribed in this Article, he will not be permitted to make an additional trip during that month. If,

however, any engineer or fireman exceeds his maximum miles or days, as stipulated in the preceding paragraphs, in any month, such excess will be charged to his mileage or days in the following month.

Note—Engineers or firemen used in combination service will be permitted to make the equivalent of 3,800 miles in freight service. This shall not be construed to modify the rule regulating mileage of men in extra service as covered by Section (c).

[fol. 168-10] (h) In regulating the working lists in the respective classes of service, each list will be handled separately. In the regulation of mileage, neither the minimum nor the maximum is guaranteed.

(i) When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list on any seniority district, those taken off, may, if they so elect, displace any fireman their junior on that seniority district under the following conditions: Reductions when made shall be in reverse order of seniority. No reductions will be made so long as those in extra passenger service are averaging the equivalent of 4,000 miles per month; in pool, chain gang or other unassigned service paying freight rates, are averaging the equivalent of 3,200 miles per month; on road extra lists are averaging the equivalent of 2,600 miles per month, and on the yard extra list are averaging the equivalent of 26 days per month.

(j) When hired engineers or firemen are laid off on account of reductions in service, they will retain all seniority rights, provided they return to actual service within thirty (30) days from the date their service was required.

## Article 26

Seniority and Filling Vacancies:

1. Seniority will be established in the following manner: The oldest fireman in road service will have the preference of runs and promotion on the seniority territory to which assigned, when competent and worthy, in accordance with the following rules: These rules apply to firemen in yard service as between themselves except at points where road seniority and yard seniority is interchangeable.

2. Firemen shall rank on the firemen's roster from the date of their first service as firemen when called for such [fol. 168-11] service except as provided for in Section 12, and when qualified shall be promoted to position as engineers in accordance with the following rules:

3. Firemen shall be examined for promotion according to seniority on the firemen's roster and those passing the required examination shall be given certificates of qualification and when promoted shall hold their same relative standing in the service to which assigned.

4. If for any reason the senior eligible fireman or engineer to be hired is not available, and a junior qualified fireman is promoted and used in actual service out of his turn, whatever standing the junior fireman so used, establishes, shall go to the credit of the senior eligible fireman or engineers to be hired, provided the engineer to be hired is available and qualifies within 30 days. As soon as the senior fireman or engineer to be hired is available, as provided herein, he shall displace the junior fireman who shall drop back into whatever place he would have held had the senior fireman to be promoted or the engineer to be hired been available and the junior fireman not used. (Qualifications as referred to herein is not intended to include learning of road or signals.)

5. As soon as a fireman is promoted, he will be notified in writing by the proper official of the Railroad of the date of his promotion, and unless he files a written protest within 60 days against such date, he cannot thereafter have it changed. When a date of promotion has been established in accordance with regulations, such date shall be posted, and if not challenged in writing within 60 days after such posting, no protest against such date shall afterwards be heard.

6. No fireman shall be deprived of his rights to examination, nor to promotion in accordance with his relative standing on the fireman's roster, because of any failure to take his examination by reason of the requirements of the Railroad's service, by sickness or by other proper leave of [fol. 168-12] absence; provided, that upon his return he shall immediately be called and required to take examination and accept proper assignment.

7. The posting of notice of seniority rank, as per Section 5 shall be done within ten days following the date of promotion and such notice shall be posted on every bulletin board of the seniority district on which the man holds rank, and both the Local and General Chairmen of the Engineers and Firemen furnished a copy.

8. Firemen having successfully passed qualifying examination shall be eligible as engineers. Promotion and establishment of a date of seniority as engineer, as provided herein, shall date from the first service as engineer, when called for such service, provided there are no demoted engineers back firing. No demoted engineer will be permitted to hold a run as fireman on any seniority district while a junior engineer is working on the engineer's extra list, or holding a regular assignment as engineer on such seniority district.

Note—Where promotion is to road service only, promotion and establishment of seniority date as road engineer will obtain.

9. On seniority district where firemen are required to fire less than three years, all engineers will be hired;

If required to fire three and less than four years, one promoted to one hired;

If required to fire four and less than five years, two promoted to one hired;

If required to fire five and less than six years, three promoted to one hired;

If required to fire six and less than seven years, four promoted to one hired;

If required to fire seven and less than eight years, five promoted to one hired.

[fol. 168-13] On seniority districts where firemen are required to fire eight years or more, all engineers will be promoted.

The foregoing will not prevent committees from having discharged engineers re-employed or reinstated on their former seniority districts at any time, and the seniority standing will be determined by the Management and the Committee representing the engineers.

10. If the engineer to be hired is not available when needed and the senior qualified fireman is promoted, the date of seniority thus established shall fix the standing of

the hired engineer, who, if available and qualified within 30 days from date senior qualified fireman is promoted, will rank immediately ahead of the promoted fireman. The promoted fireman will retain his date of seniority as engineer and will be counted in proportion of promotion.

11. In case an engineer is hired and used in actual service, when, under requirements of Section 9, a fireman, or firemen, should have been promoted, the date of seniority thus established shall fix the standing of the senior qualified fireman or firemen due to be promoted, provided he, or they, are eligible and qualify within 30 days, who shall rank immediately ahead of the hired engineer on the engineer's seniority list. The hired engineer will retain his date of seniority and be counted in proportion of engineers to be hired.

12. The seniority date of the hired or transferred engineer shall be the date of his first service as engineer, except as provided in Sections 4, 10 and 11 of this Article. Engineers hired, or permanently transferred from one seniority district to another shall be given a date of seniority as firemen corresponding with their date as engineers.

13. Firemen, except those borrowed for temporary service, will be considered permanently assigned to the seniority district where employed on December 5, 1921. Firemen transferred from one seniority district to another forfeit [fol. 168-14] all seniority on the district transferred from and assume seniority on the district transferred to from the date of their first service after being transferred.

Firemen transferred from their regular seniority district to another for temporary service, who, while on such temporary assignment, file application for permanent transfer, with the Master Mechanic having jurisdiction over that district, within sixty days from the date of their first trip after having been temporarily transferred, will, if transfer is authorized, establish seniority on the new district as of the date of their first trip thereon and forfeit all seniority on the district from which transferred.

If, under the foregoing circumstances, application for permanent transfer is not filed within the specified limit period, however, is filed thereafter, seniority on the new district will be established as of the date application is filed

with the Master Mechanic provided the transfer is authorized.

Engineers transferred for temporary service will not be continued in service away from their regular seniority districts after a sufficient number of firemen, assigned to the seniority district where such engineers are being used, become available for promotion and qualified for position as engineer to relieve them.

Engineers transferred will be counted as hired men so far as the proportion of engineers to be hired to firemen promoted is concerned. Therefore, if an engineer is transferred for permanent service at the time when, under the requirements of Section 9, Article 26, a fireman or firemen should have been promoted, he will establish a date of seniority of the senior qualified fireman or firemen due to be promoted who will rank immediately ahead of the transferred engineer.

14. Road seniority districts will be grouped with yard districts, as agreed upon and handled in the following manner: [fol. 168-15] 15. Road firemen's seniority will be established in yard service, effective September 1, 1919, in the yard district grouped with that road seniority district.

16. (a) Firemen employed in yard service previous to September 1, 1919, who are qualified, or may qualify for road service, will be given the preference of advancement to road service on the road seniority district grouped with the yard where they are employed, in preference to men employed since that date, and will assume seniority in road service from September 1, 1919, in the order of their relative standing in yard service, where they qualify as soon as given an opportunity to do so. Those who fail to make application for road service, or fail to qualify when given an opportunity to do so, including those who have become disqualified, employed or re-employed for yard service only, will be known as "Yard Fixtures," but this will not prevent them from making application thereafter for road service if they are able to meet the Railroad's requirements, in which case, they will, if able to qualify for road service, assume road seniority from the date they qualify for such service. Firemen employed for service after September 1, 1919, will be given seniority in both road and yard service from the date of their first service after employment.

Note—It is understood that fixtures in yard and hostling service shall not be displaced entirely out of the service by men holding road seniority.

(b) Firemen will not be employed or re-employed for yard service only, and hostlers will not be employed or re-employed for hostler service only, except by concurrence with the Committee, and then only in accordance with the provisions as hereafter outlined.

The above rules were revised as they now read on March 31, 1926. The following rules will govern firemen employed for yard service only and hostlers employed for hostler [fol. 168-16] service only between September 1, 1919, and March 31, 1926, or who have been thus employed by mutual concurrence since March 31, 1926.

(c) That in the reduction of forces, when a man with greater seniority is cut off, a fireman employed or re-employed for yard service only, or a hostler employed or re-employed for hostler service only since September 1, 1919, may be displaced by a senior man.

(d) That a fireman employed or re-employed for yard service only since September 1, 1919, thus displaced from a regular job at a point where no extra yard board is maintained, will be given preference over firemen on the road extra list in filling temporary vacancies in yard service until his seniority entitles him to a regular job, or in other words, an extra yard board would be established for him alone and he would be given preference in filling all vacancies of less than 30 days in the same manner as provided in Section 26, Article 26 of the Agreement.

(e) That a fireman employed or re-employed for yard service only since September 1, 1919, thus displaced from a regular job at a point where an extra yard board is maintained, will be placed on the extra yard board and take his turn with other men on that extra board until such time as his seniority entitles him to a regular job, provided his seniority as of the date he was actually employed entitles him to a place on the board, otherwise he will not be entitled to go on the extra board; further, should his seniority entitle him to a place on the extra board and later it becomes necessary to cut the board, seniority will govern in making reductions.

Note—Sections (d) and (e) apply also to hostlers employed or re-employed for hostler service only since September 1, 1919, and who have been thus displaced, that is, the same arrangement will apply as to placing them on extra boards and they will be given preference in filling vacancies of less than 30 days as hostlers as provided in Section 35, Article 26.

[fol. 168-17] (f) That the revision of the rules does not affect the status of men holding seniority as of September 1, 1919, who have been reinstated with restrictions that they are to be used in yard or hostler service only, or who may hereafter be reinstated under the same conditions.

17. Temporary vacancies in passenger service of less than ten days, will be filled by firemen standing first out in the class of service designated (on their respective divisions) to do the extra passenger work or until the regular man reports, if earlier. But when it is known the vacancy will be for ten days or longer, or if it has been for ten days, the oldest firemen (in point of seniority) in the class of service designated to do the extra passenger work may be assigned to the run and hold it until the regular man reports for duty or until it is declared vacant, when it will be advertised in the usual manner.

18. All vacancies in through passenger service will be filled by fast freight firemen (where assigned fast freight service is maintained). Vacancies in local passenger service and all extra passenger runs, including additional sections, doubleheading, troop trains, etc., will be filled by first pool men.

19. When there is a vacancy of less than ten days in fast freight service, the fireman standing first out in the first pool will fill it for one round trip, taking his turn according to register on his return. When it is known that a vacancy will be for as much as ten days, or when a vacancy has existed for ten days, the oldest man in the first pool may be assigned to the vacancy and hold same until the regular man reports, or until the run is declared vacant when it will be advertised and filled in the usual manner.

Note (a)—"When it is known that a vacancy will be for as much as ten days" refers to vacancies where it is known in advance that the vacancy will be for ten days, such as

[fol. 168-18] vacancies pending assignment by bulletin, vacancies caused by men requesting to be absent ten days or longer, etc. When a man does not specify that he desires to be absent as much as ten days it does not constitute a ten-day vacancy until after ten days elapse.

When it is known that a vacancy will be for ten days, or when it has existed for ten days, the senior man on the working list at the home terminal in the class of service designated to protect the vacancy will be notified. Should he not be within reach, or should he decline it, the senior man making application will be assigned, subject to being displaced by an older man. In the event the senior man at the home terminal does not claim the vacancy, a memorandum will be placed on bulletin board at roundhouse at the division home terminal, calling attention to it unless some other arrangement of this kind is already in effect.

The man entitled to fill the vacancy may be assigned to it at any time during the duration of the vacancy, regardless of the number of days which have elapsed since the vacancy occurred.

Should the oldest man entitled to a vacancy decline it, he is not privileged to displace a junior man who may be assigned to the vacancy.

Note (b)—Second pool men will be handled in the same manner with respect to vacancies in service which they stand to protect.

20 (a) When it is known that any assigned run will be vacant for 30 days, or when it has been vacant 25 days, it will be posted for a period of five days and the oldest fireman making application for same will be placed on the run and hold it until the regular man reports, or the run is declared permanently vacant, when it will be bulletined in the usual manner. All permanent vacancies or new runs covered by the agreement will be bulletined for a period of [fol. 168-19] ten days, and when practicable, such bulletins posted ten days prior to the date assignment is to be made.

Note—Successful applicants for runs which have been bulletined will be relieved from the run they are holding as soon as they become available after new assignment is made, and it is practicable to relieve them, providing that the service bid in has been inaugurated.

(b) Firemen off on leave of absence when runs are bulletined will be entitled to make application for such runs within five days after reporting for duty. Where more than one run in a pool of runs working first in, first out, are advertised during their absence, they can displace only the junior man on the runs which were bulletined.

(c) When it is known in advance that a work train will be needed for as many as ten days, or when a work train has been in service for as many as ten days, it will be considered as a temporary vacancy and advertised for a period of five days, and the oldest fireman making application for same will be placed on the run.

When a work train has been on for a period of 80 days, it will be re-bulletined for ten days as a permanent vacancy.

Note—It is understood that should a man give up a temporary vacancy on a work train, the same conditions apply as apply in connection with other temporary vacancies under Section 20 (a) of this article. Further, that a man holding a temporary vacancy on a work train will remain on it pending its being re-bulletined as a permanent vacancy.

(d) All bulleting will expire at 12:00 o'clock noon, except on Sundays and Holidays.

(e) Men working at outlying points who do not have access to bulletin boards will be furnished with a copy of all bulletins.

[fol. 168-20] 21. All vacancies caused by reason of filling vacancies of ten days or more on other runs or in other service will be considered as stated vacancies, of ten days or more, and handled as such. Firemen filling vacancies of ten days or more will be considered bona fide men in that class of service.

22. When any run is changed to the extent that it is operated out of different terminals, the mileage lengthened or shortened to the extent of twenty miles per day, or the schedule compensation on runs paid under Article 3, Section (a), changed to the equivalent of twenty miles per day, the arriving or departing time changed to the extent of three hours, or when a run is changed to operate six days per week instead of seven, or vice versa, it will be considered as a

new run and bulletined as such. When a regular run is annulled as much as five days consecutively, or ten days in the aggregate, within a thirty-day period, the man holding such run may, if he so elects, claim any other run that the seniority rule will entitle him to, but should he claim another assigned run, he will forfeit his rights to the run he formerly held, which will be re-bulletined when re-established.

23. In case a run is temporarily annulled the man holding such a run may, if he so elects, work in the pool or extra service for a period of not to exceed 30 days without forfeiting his right to such run, but should he displace another assigned man, or should such run not be re-established within 30 days, he must then assert his claim to such run as he may be entitled, and the run he formerly held will be re-bulletined if re-established.

24. Men displaced from runs to which they were assigned by seniority will have the privilege of claiming any run held by a younger man. Displaced men exercising their seniority rights to a pool of runs must displace the youngest regularly assigned man in the pool or the man representing him.

[fol. 168-21] Note—When claiming first or second pool, they will take the register and the junior man will be taken out of the board. If the junior man is on line of road, he will be taken out of the board on his return to the terminal.

Note—This section does not apply to the Birmingham Mineral, where such questions will be decided on the merits of each individual case, between the Firemen's Committee and the Local Officials.

25. When a run is changed to the extent that it is considered a new run, requiring it to be re-bulletined, the man holding such run will have the privilege, if he so elects, of remaining on it until the expiration of the bulletin, or of claiming any other run that is vacant and bulletined at that time until assignment is made unless such run is claimed by an older man who stands to protect such service, without forfeiting his right as a displaced man. This rule will also apply to men displaced on account of their runs being taken off or claimed by older displaced men.

Note—Men will only be permitted to fill one bulletined vacancy under this rule, except that if displaced from such

a vacancy before expiration of the bulletin, they will be privileged to claim one other.

26 (a) Where extra boards are maintained vacancies on yard engines or extra engines of less than ten days will be filled by the men standing first out on the extra board from day to day. Vacancies of ten days or more may be filled by the oldest extra man for a period of thirty days, or until the regular man reports, if earlier, except that men assigned to second shift will be entitled to claim vacancies of ten days or more on first shift, and men assigned to third shift will be entitled to claim such vacancies on either first or second shift, except that they will not be permitted to displace a senior man who may be filling or claims the vacancy.

[fol. 168-22] (b) At points where no extra board is maintained, men assigned to second shift will be entitled to claim vacancies on yard engines of ten days or more and up to thirty days on first shift, and men assigned to third shift will be entitled to claim such vacancies on either first or second shift, provided they file written notice with the Mechanical Department representative at the outlying point before a man is ordered to protect the orignal vacancy.

27. Road firemen will not be used in yard service when there are available extra yard men for such service. When there are no available extra yard men, or at points where extra yard boards are not maintained, road extra men will be used in their turns to protect vacancies or extra yard service for one day or shift, and will be run according to the register. When necessary to use first pool men to protect vacancies in yard service or extra yard service on divisions where both a first and second pool is maintained, they will be used in their turn for one day or shift without forfeiting their turn on the road list, and will be run first out after having the required rest.

Note—The above rules apply to both yard and road service where applicable. Any questions pertaining to the handling of men, filling vacancies, etc., not covered by the foregoing rules, may be temporarily provided for by local arrangement between the local officials and Local Chairman, subject to approval of the general officials and General Chairman.

28. Except in case of emergency, firemen will not be used off the division to which they are assigned. When it is necessary to borrow them for temporary service from one division to another they will be returned to their home division before additional men are employed, promoted or transferred for service thereon.

29. Seniority lists will be revised and posted at terminals in January and July of each year, and a copy furnished the [fol. 168-23] Local and General Chairman of the Engineers' and Firemen's Committees. In no case will any change be made in the seniority standing of firemen and hostlers after it has stood without written protest for two years.

30. Engineers, firemen and hostlers appointed to official positions with the Louisville & Nashville Railroad or with the Brotherhood of Locomotive Firemen and Enginemen will not forfeit their seniority on their divisions.

31. Firemen will not be promoted to positions as engineers unless they have had at least three years' road experience. They will be required to fire at least three months in freight service within a reasonable length of time prior to the date of their promotion where they are promoted from other than main line freight service. Where they have been employed as firemen in main line freight service during the year prior to their promotion they will only be required to fire freight for one month.

32. Hostlers in the service prior to January 20, 1919, will hold priority rights and have the choice of such positions over hostlers thereafter assigned to such service, in order of their ages in the service as hostlers.

33. New positions created or permanent vacancies to be filled as hostlers, will be filled from the ranks of the firemen on that division or seniority district, the oldest qualified fireman to have the preference, except as hereinafter provided for. Assignments to be made by bulletin.

34. Exceptions may be made to Section 33 hereof by mutual agreement, in order to take care of disabled or disqualified engineers or firemen in positions of hostlers on the division where they were previously employed or held seniority rights; such exceptions to be made only after conference and mutual agreement between the officials and

[fols. 168-24–168-29] the committee representing the firemen and hostlers.

35. Temporary vacancies of less than ten days of hostlers will be filled by the fireman first out in the first pool who is qualified. Vacancies of ten days or more may be filled by the oldest first pool man who is qualified. Vacancies of 30 days or more will be bulletined for the oldest qualified fireman or hostler making application for same.

36. Wherever electric or other power is installed as a substitute for steam, or is now operated as a part of this system on any of the tracks operated or controlled by the railroad, the locomotive firemen shall have preference for positions as firemen or helpers on electric locomotives; but these rights shall not operate to displace any men holding such positions on the date of issuance of this agreement.

. . . . . .

[fol. 168-30] Article 31

Board of Inquiry and Discipline:

(a) Firemen, hostlers and helpers will not be demerited, discharged or otherwise disciplined without just cause.

(b) When it appears necessary to discipline a fireman or hostler by demerit or discharge, he will be notified in writing of the cause therefor, within ten days after knowledge of such cause comes to the officer or officers of the railroad having authority in such case, and within ten days after the notification there will be an investigation conducted by the proper officer or officers of the railroad, at which all evidence in the case will be submitted. The party so notified will be permitted to attend the investigation; to have such witnesses as he may desire to testify; to hear all evidence and to be represented by the Chairman of the Local Committee of his organization and or by fellow employes of his own selection.

(c) A proper record of the case will be made and certified to on the part of the railroad and on the part of the party subject to discipline in connection therewith, and the record will be made the basis for administering discipline, or of appeal to a higher officer.

[fol. 168-31] (d) Within ten days after the close of the investigation unless further time is mutually agreed upon,

the proper officer will notify the party in question of the decision and action. If the decision is unsatisfactory, the party in question has the right to appeal to the Director of Personnel, except that in cases pertaining exclusively to mechanical matters, the appeal will be made through the Superintendent of Machinery.

Note—It is understood that Section (e) and understandings reached in connection with this article, as covered by Assistant General Manager's letter of July 23, 1925, are subject to the same understanding being retained which has been in effect for many years past, that is, that the investigation will not be considered as closed until the papers have been approved by the Management.

(e) When an employe has been disciplined and desires to appeal, he or his representative will, upon application, be furnished with a copy of all statements taken at the investigation.

(f) If the discipline administered is not sustained, it will be cancelled, and the party in question will be paid for any time lost by him resulting from the investigation or action taken.

Note—This section applies only where a man is held out of the service or taken out of the service on account of his responsibility, and does not refer to loss of time on account of being held off of his run to attend investigation

(g) Firemen, hostlers and outside hostler helpers held out of the service to attend investigations of cases in which they are not held responsible, thereby losing a run or a day's work, will be paid as follows: Firemen assigned to regular runs will be paid for time lost; when in pooled, chain gang or extra service they will be paid $6.15 for each calendar day held; outside hostlers will be paid $6.27, inside [fol. 168-32] hostlers $5.63 and outside hostler helpers $5.07 for each calendar day so held.

Note—Payments under this section do not apply to men not losing any time, to men who are held responsible, or for deadheading to attend investigations.

Payments to men assigned to regular runs or jobs for time lost will include overtime they would have earned on their run or job.

Chain-gang or extra men held out of service to attend investigation will mark up at the foot of board after being released from the investigation, and will be paid the amount specified for each calendar day held off, a calendar day being from midnight to midnight. Examples—

A chain-gang fireman stands to go out at 9:00 A. M. He is held off to attend investigation at 10:00 A. M. Investigation is concluded at 3:00 P. M. and he is released. If not held responsible, he is entitled to the amount specified for one calendar day. Should the investigation not be concluded on that day and he is held and required to report on the following day, and relieved at 11:00 A. M., he is entitled to pay for two calendar days at the rate specified.

A chain-gang fireman stands to go out at 6:00 P. M.; is held off his run to attend investigation the following day and is released at 11:00 A. M. If not held responsible he is entitled to pay for two calendar days at the rate specified.

The above does not apply when they are held off their run while laying over at an away-from-home terminal, payment under this condition to be made on run around basis. (This refers to chain-gang crews.)

[fol. 168-33] ARTICLE 32

Right to make and interpret contracts:

(a) The right to make and interpret contracts, rules, rates and working conditions for locomotive firemen and hostlers is vested in the regularly constituted Committee of the Brotherhood of Locomotive Firemen and Enginemen and the General Officials of the Railroad.

Representation:

(b) The right of any engineer, fireman or hostler to have the regularly constituted Committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Railroad and the General Committee making the same, is conceded.

Construction and general rulings:

(c) General rulings or interpretations as to the proper construction of this Agreement will not be made except in

conference between the General Officials of the Railroad and the General Committee or General Chairman. When such rulings or interpretations are made, a copy of same will be furnished to the parties affected and the General Chairman.

(d) Interpretations of the United States Railroad Administration will apply to rules covered by Supplements Nos. 15 and 24, unless mutually agreed to the contrary.

(e) Local officials will not enter into local agreements with local committees or with any individual fireman or hostler in conflict with this Agreement, without the approval of the General Officials and General Chairman.

[fols. 168-34—168-40] Grievances:

(f) Local grievances and differences of opinion shall be taken up with the division officials by the duly authorized representatives of the men. Failing to be adjusted, they will be referred to the General Officials. When an appeal is to be taken to the General Officials, however, division officials will be advised to that effect, in writing, in order that their data may be sent to the General Officials for their use in considering the case.

(g) Local grievances shall be presented to the division officials in writing and they will make reply, in writing, within a reasonable time.

[fol. 168-41] ARTICLE 43

Durafion of agreement:

The rates, rules and working conditions as provided herein, shall be continued in effect, subject to thirty days' written notice my either party.

For the Louisville & Nashville Railroad, John Bose, Director of Personnel. For the Firemen and Hostlers, W. G. Metcalfe, General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

[fol. 169] Original Exhibit No. I: which was attached to and made a part of the Substituted Amended Bill:

[Original Exhibit No. I is the same as Complainant's Exhibit "AA" attached to page 168.]

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA,
IN EQUITY

THE STATE OF ALABAMA,
Jefferson County:

I, G. H. Boyd, Register of the Circuit Court, Tenth Judicial Circuit of Alabama, In Equity, do hereby certify that pages one and two of the Supplemental Transcript contains the original of the Exhibits "AA" and "One", which were ordered by the Court to be sent to the Clerk of the Supreme Court in order that same might be inspected personally by the Judges of the Supreme Court.

Witness my hand and seal of office, this the 24th day of June, 1943.

(Signed) G. H. Boyd, Register. (Seal.)

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[fol. 170] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 171] IN THE SUPREME COURT OF THE UNITED STATES
STIPULATION GOVERNING PRINTING OF RECORD

The parties hereto stipulate that in printing the record the Clerk of the United States Supreme Court shall cause to be printed from the "Agreement between the Louisville & Nashville Railroad and its Locomotive Firemen and Hostlers", etc., issued March 1, 1929, the following sections only:

Heading, thru words "Issued March 1, 1929" p. 1.
Article 25, pp. 25-34.
Article 26, pp. 34-48.
Article 31, pp. 54-56.
Article 32, pp. 57-58.
Article 43, p. 65.
Signatures, p. 65.

Right is reserved by each party and to the Court to refer to the entire Agreement aforesaid, which has been filed

with and certified by the Supreme Court of Alabama as part of the record in this case.

Chas. H. Eyster & White E. Gibson, Counsel for Respondent Louisville & Nashville Railroad Company; John W. Lapsley, Counsel for Respondent Brotherhood of Locomotive Firemen & Enginemen.

Arthur D. Shores, Charles H. Houston, Joseph C. Waddy, Counsel for Petitioner.

March 27, 1944.

[fol. 172] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

3. that Congress had left seniority rights as a matter of contract to the parties and the contract in question was lawful (R. 143; loc. cit. at pp. 419, 423).

4. that neither the Railroad nor the Brotherhood was guilty of fraud (R. 144; loc. cit. at pp. 420, 422).

5. that the restraints of the Fifth Amendment do not apply (R. 134; loc. cit. at p. 418).

## Questions Presented.

1. Does the representative under the Railway Labor Act of an entire craft or class of firemen on a carrier have a duty to represent all members of the craft or class, including the minority firemen, fairly and impartially?

2. Are the grant of power by Congress to and the exercise of such power by the collective bargaining representative under the Railway Labor Act subject to the restraints of the Fifth Amendment to the United States Constitution?

3. Did the Notice of March 28, 1940, the Agreement of February 18, 1941 and Supplement of May 12, 1941 under the circumstances infringe petitioner's rights and deprive him of his property without due process of law as guaranteed him by the Fifth Amendment, and impose on him an economic servitude inconsistent with the Thirteenth Amendment?

## Reasons for Granting the Writ.

1. There is a basic conflict between the decision of the United States Circuit Court of Appeals, Fourth Circuit, in a companion case (*Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, U. S. Supreme Court, October Term, 1943 No. 779) and the Alabama Supreme Court as to the effect of the decisions of the United States Supreme Court cited herein on p. 7, and in the record at p. 134.

2. There is no administrative tribunal or agency established under the Railway Labor Act with jurisdiction to

afford minority workers an opportunity to be heard and redress against wrongs and oppression by the majority workers who have seized the bargaining rights and grievance representation for the entire craft or class by virtue of the Railway Labor Act,

3. This case peremptorily calls for review by this Court to establish uniformity of operating conditions on interstate carriers as to the position of the craft representative under the Railway Labor Act, so that the rights and duties of the craft representative will not vary from state to state. For example, compare the present case with

*Ledford* v. *Chicago, M. & St. P. Ry. Co.*, 298 Ill. App. 298, 18 N. E. (2d) 568 (1939);

*Piercy* v. *Louisville & Nashville R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923, antedating the Act).

4. The questions presented are of paramount public interest as they affect not only Negro firemen but all minority workers in the railway industry, and consequently the whole condition of interstate commerce throughout the nation.

5. Unless this controversy is decided by the peaceable processes of the Courts it will lead to industrial warfare and paralysis of the war effort.

WHEREFORE petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court entered herein January 13, 1944, and that the Court reverse such judgment after hearing and consideration.

Respectfully submitted,

ARTHUR D. SHORES,
CHARLES H. HOUSTON,
*Counsel for Petitioner.*

JOSEPH C. WADDY,
*Of Counsel.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Preliminary Statement.

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of statute involved and a summary statement of the case.

We further ask that this case be considered along with its companion case, *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, October Term, 1943, No. 779.

### Specifications of Error.

The Alabama Supreme Court erred in holding

1. That the Railway Labor Act imposed no fiduciary duties on the collective bargaining representative as to the minority members of the craft, and that the representative can advance the interests of the majority at the expense of the minority.

2. That the grant of power by Congress under the Railway Labor Act to the representative designated by the majority to bargain collectively for the entire craft or class and the exercise of such power by the representative were not subject to the restraints of the Fifth Amendment to the United States Constitution.

3. That the Notice of March 28, 1940, the Agreement of February 18, 1941 and the Supplement of May 12, 1941 were lawful as respects petitioner.

4. That the Substituted Amended Complaint and supporting Exhibits did not state a cause of action.

## Summary of Argument.

1. The Railway Labor Act imposes a duty on the representative under the Railway Labor Act of an entire craft or class of workers to represent all members of the craft fairly and impartially.

2. The grant of power by Congress under the Railway Labor Act to the representative designated by the majority to bargain collectively for the entire craft or class and the exercise of such power by the representative were subject to the restraints of the Fifth Amendment to the United States Constitution.

3. The Subsituted Amended Complaint stated a cause of action meriting all the relief prayed for.

4. The conflict of judicial opinion regarding the position of the craft representative under the Railway Labor Act needs to be reconciled.

## ARGUMENT.

### I.

**The Railway Labor Act imposes a duty on the representative under the Railway Labor Act of an entire craft or class of workers to represent all members of the craft fairly and impartially.**

The collective bargaining and grievance representative of an entire craft or class of workers under the Railway Labor Act is not the master but the servant of all the workers it represents.

E. g., see Section 1 (Sixth); Section 2; etc.

Every document in this case demonstrates the fact that both the Brotherhood and the Railroad recognize that the Brotherhood acts in the collective bargaining process as agent for the craft of firemen.

See:

Heading and signatures to the Firemen's Agreement issued March 1, 1929 (R. 146; 148);
Form of the Notice of March 28, 1940 (R. 59);
Form of the Agreement of February 18, 1941 (R. 13);
Form of the Supplemental Agreement of May 12, 1941 (R. 21).

The position taken by the Alabama Supreme Court that the representative has no duty toward the minority and can advance its own interests to the detriment of the minority has no support in the history of Federal Railway Labor legislation, the text of the Act, or precedents governing the position of a labor union as regards its own membership.

See:

*Piercy* v. *Louisville & Nashville R. Co., supra;*
*Cameron* v. *International Alliance,* 118 N. J. Eq. 11, 176 A. 697, 97 A. L. R. 592.

The position of the Alabama Supreme Court would permit the bargaining representative to establish a closed shop against the very text of the Act.

See:

Sec. 2—Fourth and Fifth
40 Opinions of the Attorney General, Op. 59.

In fact the position of the Alabama Supreme Court is so patently arbitrary and open to every objection raised by this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238,

80 L. Ed. 1160 (1936), that extended argument is superfluous.

The contention of the Alabama Supreme Court that the action of the Brotherhood was in execution of traditional railroad practice of promoting only white firemen to the position of locomotive engineer and of making available more white promotable firemen for possible promotion to engineers does violence to the complaint and ignores all the supporting papers attached as Exhibits.

1. There is absolutely nothing to show that this Railroad, or any other Railroad, was suffering from a shortage of engineers when the Notice of March 28, 1940 was served by the Brotherhood or when the Agreement of February 18, 1941 or Supplement of May 12, 1941 was entered into, or that anybody anticipated any shortage. The Railroads had been obtaining sufficient engineers through all their history without curtailing the rights of Negro firemen as firemen as the Brotherhood proposed and insisted upon. The Railroads were not complaining. The Notice and the pressure proceeded from the Brotherhood for selfish reasons (R. 89).

2. The very terms of the Notice of March 28, 1940 show that the patent purpose of the Brotherhood was *complete elimination* of Negro firemen in the railroad industry. The Notice was not confined to the respondent Railroad but extended to the major lines operating in the Southeastern section of the United States, where employment of Negro firemen is chiefly concentrated (R. 60).

3. The Agreement of February 18, 1941 itself demonstrates the purpose of the Brotherhood: Employment of Negro firemen was cut to 50% on seniority districts where they were then working, they were barred absolutely from employment on any other seniority districts and the Broth-

erhood left its hands free to press for more onerous restrictions on use of Negro firemen on the individual carriers beyond the limitations imposed by the Agreement itself (R. 12-13).

4. The Brotherhood in the Supplement of May 12, 1941 grabbed the last fractional advantage over Negro firemen by providing that under the 50% restriction, promotable men (Brotherhood members) should always get the odd job (R. 13-21).

All of these facts the Alabama Court deliberately ignored, as well as the specific charges in the Substituted Amended Complaint that the purpose of the Brotherhood in the premises was to drive the Negro firemen out of employment and create a closed shop for its own membership; that it asserts exclusive grievance representation for the entire craft of firemen but refuses to represent the Negro firemen when their interests conflict with those of its own membership (R. 88). On demurrer these allegations must be taken as true.

The entire position of petitioner rests upon the relationship which Congress created between the collective bargaining and grievance representative and the members of the craft it represents under the Railway Labor Act. If Congress established a confidential relationship between the representative and the workers, and imposed fiduciary duties on the representative to represent all members of the craft impartially, petitioner has undoubtedly stated a cause of action. Since this is not an extensive brief on the merits, and since the argument that Congress did establish such a confidential relation and fiduciary duty on the representative has been made in the *Tunstall* case (See Petition and Brief. No. 779 *supra* pp 9-12), petitioner contents himself with referring to that argument and adopting it herein.

The nub of the whole matter is that the Alabama Supreme Court gagged on the possibility of promotion of Negro locomotive firemen to the position of engineer (R. 142; loc. cit. at p. 422). Although petitioner did not raise that question in this case, the Court itself conjured up the matter:

> "True, complainant in this particular case does not seek to be placed in the promotable class; that is, he does not seek to be declared in this suit eligible for the position of engineer. But our previous discussion discloses that a recognition of the principles for which he contends here will ultimately lead to that end. If the Brotherhood is his confidential agent, and must look to his interest, it must look to his promotion in the final analysis." (R. 142; loc. cit. at p. 422).

Petitioner is not seeking promotion but protection of his rights as a fireman; and he declines to permit the issue to be turned from that point.

II

**The grant of power by Congress under the Railway Labor Act to the representative designated by the majority to bargain collectively for the entire craft or class and the exercise of such power by the representative were subject to the restraints of the Fifth Amendment to the United States Constitution.**

Petitioner concedes that the restraints of the Fifth Amendment have not yet been applied to the actions of private individuals proceeding without reference to a grant of governmental authority.

See *Corrigan* v. *Buckley*, 271 U. S. 323, 70 L. ed. 969.

But that is not this case. The Brotherhood represents the entire craft or class of firemen on respondent Railroad not by mandate of the men themselves but solely by grant of power from Congress in the Railway Labor Act. The

Brotherhood is fastened on the Negroes against their consent and being in the minority they have no way of unloading the Brotherhood as their representative under the Railway Labor Act. Further Congress has set up no administrative machinery under the Railway Labor Act to deal with disputes between different classes of employees within a craft which do not involve the identity of the representative. No administrative machinery is established under the Act to supervise or check the conduct of the representative once chosen. Yet the effect of the grant of power by Congress to the Brotherhood as representative under the Act of the entire craft of firemen and the actual exercise of that power by the Brotherhood as sanctioned by the Alabama Supreme Court is to place the minority members' jobs at the absolute and unrestrained power of the representative. Such unbridled grant of power, with no guiding standards, would be an unconstitutional delegation of legislative power and deprivation of liberty and property without due process of law.

*Carter* v. *Carter Coal Co., supra.*

The question cannot be dismissed cavalierly, as the Alabama Supreme Court attempts to do, by suggesting that the Brotherhood is a private person (R. 134; loc. cit. at p. 418).

*Nixon* v. *Condon*, 286 U. S. 73, 88, 76 L. Ed. 984, 990:

> "The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. • • • The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (loc. cit. at p. 88)

Here unless the grant of power is to violate both the Fifth and Thirteenth Amendments and place the Negro firemen in economic serfdom to the Brotherhood, the grant must be subject to constitutional restraints. It is unthinkable that Congress, itself the creature of representative government with limitations both written and implied, did not use the word *representative* in the Railway Labor Act in the sense of creating such representative the agent or servant of the workers it represents, with a duty to represent the entire craft impartially.

## III.

**The Substituted Amended Complaint stated a cause of action meriting all the relief prayed for.**

It is to be noted that the Alabama Supreme Court did not raise any procedural questions in disposing of this case; but it did misread the facts and statements in the Substituted Amended Complaint and exhibits.

For example, it states: "There is no charge of bad faith or malice against the complainant or any of his class" on the part of the Brotherhood (R. 142; loc. cit. at p. 422). The complaint specifically charges the Brotherhood with being hostile and disloyal to the Negro firemen and details the particulars (R. 88). It specifically charges fraud and details the particulars (R. 88-93).

The Alabama Supreme Court concedes that an unlawful invasion or interference with seniority rights is actionable (R. 135; loc. cit. at p. 419), but finds the interference in the present case lawful.

The case returns to the point of beginning: the relationship between the craft representative under the Railway Labor Act and the members of the craft it represents. The Court concedes that if a confidential relationship and fiduciary duty have been created, the Brotherhood violates same by advancing its own interests at the expense of the minor-

ity (R. 142; loc. cit. at pp. 419-423). But it finds that "Congress in providing for collective bargaining by representative of a craft or class, had no intention of creating a confidential relationship of principal and agent" (R. 136; loc. cit. at p. 419).

Based on such relationship petitioner is entitled to all the relief sought:

1. Damages:

*U. S. F. & G. Co.* v. *Millonas*, 206 Ala. 147, 89 So. 732, 29 A. L. R. 520;
*Farris* v. *Dudley*, 78 Ala. 124.

2. Injunction:

*Bankers Fire & Marine Ins. Co.* v. *Sloss*, 229 Ala. 26, 155 So. 371;
*Rogers* v. *Brightman*, 189 Ala. 228, 66 So. 71 (1919);
*Ledford* v. *Chicago, M. & St. P. Ry. Co., supra;*
*Piercy* v. *L. & N. R. Co., supra.*

3. Discovery:

*Shelton* v. *Timmons*, 189 Ala. 289, 66 So. 9.

4. Declaratory judgment:

Ala. Code 1940, Title 7, Art. 12.

The cases cited by the Alabama Supreme Court to support its ruling that the Brotherhood had control over petitioner's seniority rights do not reach his situation. These cases hold that the representative can *incidentally* modify the seniority rights of individual workers "in the interests of all the members."

E. g. *Hartley* v. *Brotherhood of Ry. & S. S. Clerks*, 283 Mich. 201, 277 N. W. 885, 887 (cited by the Alabama Court R. 135, loc. cit. at p. 419).

But our case is one where the Brotherhood curtailed petitioner's seniority rights through hostility to petitioner and for the profit of its own members.

*Cf. Ledford* v. *Chicago, M. & St. P. Ry. Co., supra.*

This Court is not bound by the construction placed on the Substituted Amended Complaint by the Alabama Supreme Court. Where constitutional rights are claimed and the decision on the question of the right depends on the facts, this Court will make its own independent review and finding on the claim of discrimination.

*Norris* v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074.

## IV.

**The conflict of judicial opinion regarding the position of the craft representative under the Railway Labor Act needs to be reconciled.**

The conflict of judicial opinion has already been noted: *cf. Ledford* v. *Chicago, M. & St. P. Ry. Co., supra*, with the instant case. Compare also the *Tunstall* case, No. 779, *supra*, with the instant case on the applicability of the three decisions of this Court above cited.

Certainly argument is unnecessary to demonstrate the need of review under such circumstances so that there may be uniformity of operating conditions in interstate commerce, and so that the collective bargaining representative will have the same rights and duties with respect to the craft or class of workers it represents along the entire mileage of the carrier.

## Conclusion.

Repeatedly the efforts of the white firemen to drive the Negro firemen out of service have broken out in violence. The records are recorded in the Federal Archives; the tes-

timony was taken before the President's Committee on Fair Employment Practice in September, 1943; before the Select Committee of the House of Representatives to Investigate Executive Agencies (Smith Committee) in March, 1944. The seeds of industrial warfare which will adversely affect the war effort are present. It is paramount in the public interest that the rights and duties of the collective bargaining and grievance representative under the Railway Labor Act be determined peaceably by the Courts, since no other forum for hearing and determination of the problem exists (and a forum must be found to satisfy the requirements of due process—See *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. Ed. 185) rather than risk the interruption to commerce and attendant evils by settling the question by violence.

Respectfully submitted,

ARTHUR D. SHORES,
CHARLES H. HOUSTON,
*Counsel for Petitioner.*

JOSEPH C. WADDY,
*Of Counsel.*

# APPENDIX

Brotherhood of Locomotive Firemen and Enginemen

General Grievance Committee

—— Railway,
March 28, 1940.

Mr. —— ——.

Dear Sir:

This is to advise that the employees of the —— Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen, have approved the presentation of request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen or helpers on other than steam power are those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor Act kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

The same request is this date being presented on the following railroads.

Atlantic Coast Line.
Jacksonville Terminal.
Atlanta Joint Terminal.
Atlanta & West Point.

Western Railroad of Ala.
Central of Georgia.
Frankfort & Cincinnati.
Georgia Railroad.
Georgia & Florida.
Gulf, Mobile & Northern.
Louisville & Nashville.
Memphis Union Station Co.
Louisiana and Arkansas.
Mobile and Ohio, Columbus & Greenville.
Norfolk and Portsmouth Belt.
Norfolk & Southern.
Norfolk & Western.
Seaboard Airline.
Southern Railroad System.
St. Louis-San Francisco.
Tennessee Central.

It is our request that all lines or division of railway controlled by the —— Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for the purpose of discussing the proposal. In event settlement is not reached in conference, it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition, shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly,

(Signed) —— ——,
*General Chairman.*

**Agreement.**

Between

The Southeastern Carriers' Conference Committee, Representing the Atlantic Coast Line Railway Company.

Atlanta and West Point Railroad Company Western Railway of Alabama.

Atlanta Joint Terminals.

Central of Georgia Railway Company.

Georgia Railroad.

Jacksonville Terminal Company.

Louisville and Nashville Railroad Company.

Norfolk and Portsmouth Belt Line Railroad Company.

Norfolk Southern Railroad Company.

St. Louis San Francisco Railroad Company.

Seaboard Air Line Railway Company.

Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company).

The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Alabama Great Southern Railroad Company (including Woodstock and Blocton Railway Company and Belt Railway Company of Chattanooga).

New Orleans and Northeastern Railroad Company.

New Orleans Terminal Company.

Georgia Southern and Florida Railway Company.

St. John River Terminal Company.

Harriman and Northeastern Railroad Company.

Cincinnati, Burnside and Cumberland River Railway Company.

Tennessee Central Railway Company and the Brotherhood of Locomotive Firemen and Enginemen.

(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement

does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineers.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. and E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required in addition to showing in the opinion of management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examination for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a perod of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examinations for promotion or fail to pass as herein provided they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carrers.

(8) Ths agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Employees:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
D. B. ROBERTSON,
*President.*

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN'S COMMITTEE,
W. O. METCALFE,
*Chairman.*

For the Carriers:

SOUTHEASTERN CARRIER CONFERENCE COMMITTEE,
C. D. MACKAY,
*Chairman.*

C. D. MACKAY,
H. A. BENTON,
C. G. SIBLEY,
*Committee Members.*

## Supplemental Agreement.

Agreement in connection with application on the L. & N. Railroad of Agreement between the Southeastern Carriers Conference and the Brotherhood of Locomotive Firemen and Enginemen, dated Washington, D. C., February 18, 1941, to become effective February 22, 1941, regarding the employment and the assignment of firemen, as agreed by

Mr. W. B. Porter, Asst. Director of Personnel
Mr. G. C. Howard, Asst. Director of Personnel

Representing the L. & N. Railroad, and

Mr. W. C. Metcalfe, General Chairman

1. Q. What constitutes a new run under Article 2 (b) of the agreement above mentioned?

A. When it is changed to the extent that it is operated out of different terminals, the mileage lengthened or shortened to the extent of 20 miles per day, or the scheduled compensation on runs paid under Article 3, Section (a), of the general Agreement, changed to the equivalent of 20 miles per day, when a run is operated six days per week instead of seven, or vice versa, and new run hereafter inaugurated or any run discontinued and thereafter reestablished. (See Article 25, Sections 12 and 13.)

In yard service it is understood that a new job is when a job is changed from a six day job to a seven day job, or from a seven day job to a six day job, or where the point for going on duty or being relieved is permanently changed as such as one-half mile, and any job hereafter inaugurated or any job discontinued and thereafter rebulletined. Changing the off day without changing the number of days worked per week would not constitute a new job. (See Art. 25, Sections 12 and 13.)

*Adjusting Pool Boards*

2. Q. In the matter of increasing first and second pool boards, where such pools are maintained, would the addition of one or more men to such pools be considered as

a new job in the purview of Article 2(b) of the above mentioned agreement?

A. Yes.

3. Q. In making reduction in the number of men in either the first or second pool, how would these reductions be made as regards promotable and non-promotable firemen?

A. Seniority will govern provided the percentage of promotable firemen will not reduce when such percentage is 50 or below.

For example:

If the first pool firemen's board were increased from ten to twelve men, there being six non-promotable and four promotable men in that board, two promotable firemen should be added to bring the board up to twelve, or 50 per cent.

If a reduction were made in such board from twelve to ten or two men were to be cut off, one promotable and one non-promotable firemen would be cut off, provided the two junior firemen were promotable, but if three instead of two men were cut from the board, then one promotable and the two junior non-promotable men would come off.

To further illustrate: If in second pool there were 25 promotable and one non-promotable firemen and it was necessary to cut the board five men, the one non-promotable fireman would be allowed to remain in the pool provided he had seniority over the five promotable men cut off.

To again illustrate: If the first pool had ten non-promotable and two promotable firemen and the pool had to be reduced for men, or to sixteen. In the event non-promotable men had seniority over the promotable men, the promotable men would be cut off to the extent of reducing and maintaining the ratio 50-50. If there were six promotable and six non-promotable men in the pool, and it were necessary to cut two men off, the two junior firemen being non-promotable, they would be cut off under the seniority rules.

*Passenger Service.*

*Examples.*

4. Q. There are three groups of passenger runs, two firemen being assigned to each group—a total of six men, all non-promotable. Each fireman is required to lose three round trips per month account of mileage regulations. Their runs are grouped together and seven firemen assigned to protect them in lieu of the gouge, working first in, first out. Under Article 26, Section 22, the six runs would be advertised.

How should assignments be made?

A. In the event the mileage of the six non-promotable firemen was not decreased to the extent of twenty miles per day, or the equivalent of twenty miles per day, these six men could not be disturbed, except under seniority rules. However, the senior promotable firemen bidding as the 7th man in the pool, would be assigned to the job.

5. Q. In the event the mileage or the equivalent thereof is decreased twenty miles per day, how would assignments then be made?

A. On seniority except that non-promotable firemen could not be assigned to more than 50% of the jobs.

6. Q. Should these same runs later be changed and six crew reassigned as formerly, the 7th job being cut off, how should assignments then be made?

A. Senior applicants should be assigned.

7. Q. How should assignments be made, when the ratio of nonpromotable to promotable firemen is 6 and 4, and a new run is added, requiring

(A) 1 additional fireman? Ans. Senior promotable fireman should be assigned.

(B) 2 additional firemen? Ans. Two senior promotable firemen should be assigned.

(C) 3 additional firemen? Ans. Three senior promotable firemen should be assigned.

8. Q. Should another run be added requiring one fireman after the ratio has reached 6 non-promotable and 7 promotable firemen, how should assignments be made?

A. As the ratio of non-promotable to promotable is less than 50%, the senior applicant would be assigned whether non-promotable or promotable.

9. Q. In passenger service the ratio of non-promotable to promotable firemen stand 5 to 4. In this class there is a group of 3 passenger runs manned by four non-promotable and two promotable firemen. A new run is added to this group requiring two men and the entire group of runs is advertised, how should assignments be made?

A. Two promotable senior firemen should be assigned to the group.

10. Q. With the ratio in this class standing 6 and 6 "A" one of the promotable firemen is assigned as engineer. How should this vacancy be filled?

A. By senior promotable firemen.

11. Q. When "A" is cut off as engineer, to what run is he entitled?

A. To any run held by a junior fireman, either promotable or non-promotable.

12. Q. Should "A" displace a junior promotable fireman in this class, how should the lafter be governed?

A. He should displace any junior fireman.

13. Q. If "A" displaces a junior non-promotable fireman in this class, how should the latter be governed?

A. He could exercise his seniority over any junior non-promotable firemen provided that in doing so the non-promotable firemen should not be assigned to more than 50% of any class of service.

14. Q. The ratio in passenger service is 50-50. There are four runs one of which is discontinued and the remaining three runs in the group are readvertised for six men. How should assignment be made?

A. To the senior applicant unless so doing the ratio of non-promotable firemen would exceed 50%, in which event

sufficient promotable junior firemen should be assigned to prevent non-promotable firemen exceeding 50%.

15. Q. The ratio of non-promotable to promotable firemen in passenger service is 5 and 8. A new run is added, requiring:

(A) Two men
(B) Three men
(C) Four men

How should assignments be made?

A. (A) Senior applicants would be assigned.
(B) Senior applicants would be assigned.
(C) Senior applicants would be assigned, unless by so doing the ratio of non-promotable to promotable firemen would thereby exceed 50%, in which event sufficient junior promotable firemen would be assigned to avoid this.

*Assigned Through Freight Service.*

16. Q. The ratio of non-promotable to promotable firemen is 8 and 5. One of the non-promotable firemen gives up his run and takes pool service, how should his vacancy be filled?

A. By the senior applicant.

17. Q. Should the senior applicant be promotable fireman in the same class, how should this vacancy be filled?

A. By the senior applicant.

18. Q. The ratio of non-promotable to promotable firemen is 7 and 5. A non-promotable fireman dies, is discharged, resigns, or is disqualified, how should this vacancy be filled?

A. By the senior applicant. (promotable)

19. Q. The ratio of non-promotable firemen is 5 and 7. A non-promotable fireman dies, is resigned, or is discharged, how should his place be filled?

A. By the senior applicant.

20. Q. The ratio of non-promotable to promotable firemen is 6 and 6. A new run is added requiring two men, how should the assignment be made?

A. By the senior applicant unless both are non-promotable firemen, in which event the senior promotable fireman and senior non-promotable fireman should be assigned.

21. Q. The ratio of non-promotable firemen to promotable firemen is 6 and 6. A new run is added requiring three men, how should assignments be made?

A. The senior applicant, unless they are all non-promotable firemen in which event one senior non-promotable and two senior promotable firemen will be assigned.

*First Pool.*

22. Q. The ratio of non-promotable to promotable firemen in first pool is 6 and 4. At the adjustment period, two men are added to the pool. How should assignments be made?

A. The two senior promotable applicants should be added.

23. Q. The ratio of non-promotable firemen to promotable firemen in the first pool is 6 and 4. At the adjustment period two men are to be taken out of pool. Should non-promotable or promotable men be taken out?

A. The two junior non-promotable firemen should be taken out of the pool.

24. Q. The ratio of non-promotable firemen to promotable firemen in first pool is 6 and 6. At adjustment period two men are to be taken out. Should non-promotable or promotable men be taken out?

(A) Two junior men being non-promotable

(B) Two junior men being promotable

(C) One of the junior men being non-promotable and one being promotable?

A. (A) Seniority would govern and the two junior men would be taken out of the pool.

(B) The junior promotable and the junior non-promotable would be taken out of the pool.

(C) Seniority would govern.

25. Q. With the same ratio under same circumstances as outlined next above, three men are to be taken out of the pool:

(A) The three junior men being non-promotable.

(B) The three junior men being promotable.

(C) The two junior men being non-promotable and the next junior man promotable.

A. (A) Seniority would govern.

(B) One junior promotable man and the two junior non-promotable men would be taken out.

(C) Seniority would govern.

Q. (D) The two junior men being promotable and two next junior men being non-promotable.

A. (D) The junior promotable man and two junior non-promotable men.

26. Q. When "A" is cut off as engineer, how should he place himself?

A. He may displace any junior fireman.

27. Q. The ratio of promotable and non-promotable firemen is 6 and 6. "A" is assigned as engineer, how should his vacancy be filled?

A. By senior promotable fireman.

28. Q. The ratio of non-promotable to promotable firemen in first pool is 7 and 6. "A" is assigned as engineer. How should his vacancy be filled?

A. By senior promotable applicant.

29. Q. "A" is later cut off as engineer. How should he place himself?

A. He may displace any junior fireman.

30. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 6. The first pool at adjustment period is reduced two men, resulting in displacement of two men in second pool? Who should be displaced?

(a) If the two junior men in second pool were promotable men?

(b) If the two junior men in second pool were non-promotable men?

MAR 29 1944
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1943

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## No. [redacted] 45

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BESTER WILLIAM STEELE,

*Petitioner,*

*vs.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, A CORPORATION; BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, W. H. THOMAS, J. P. ADAMS AND B. F. McGILL.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

---

ARTHUR D. SHORES,
CHARLES H. HOUSTON,
*Counsel for Petitioners.*

JOSEPH C. WADDY,
*Of Counsel.*

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1943

## No. 826

BESTER WILLIAM STEELE,

*Petitioner,*

*vs.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, A CORPORATION; BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, W. H. THOMAS, J. P. ADAMS AND B. F. McGILL.

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner Bester William Steele respectfully prays that a writ of certiorari issue to review a judgment of the Alabama Supreme Court entered in the above-entitled cause January 13, 1944, which affirmed a decree of the Circuit Court of Jefferson County, dismissing petitioner's Substituted Amended Complaint on demurrers filed thereto by the respondents.

### Opinions Below.

The opinion of the Alabama Supreme Court is reported in 16 So. (2d) 416; and in the record at pp. 131 to 144.

The opinion of the Circuit Court of Jefferson County is not reported. It appears in the record at pp. 124 to 126.

## Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Section 347).

## Statute Involved.

The statute involved is the Railway Labor Act (Act of May 20, 1926 as amended by the Act of June 20, 1934 (45 U. S. C. Sections 151-164), which is printed in the appendix to the petition and brief in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, October Term, 1943, No. 779, to which reference is now respectfully made.

## Statement.

This case was submitted and decided on petitioner's Substituted Amended Complaint and supporting Exhibits (R. 83 to 98).

Petitioner, a Negro locomotive fireman employed by the respondent Louisville & Nashville Railroad Company (hereinafter called the Railroad) on its seniority district known as the South and North Alabama Division (hereinafter called the S. & N. A. Division), sued the Railroad and the Brotherhood of Locomotive Firemen & Enginemen (hereinafter called the Brotherhood) which represented the entire craft of locomotive firemen on the Railroad under the Railway Labor Act and certain members of the Brotherhood, for injunction against the Railroad or the Brotherhood enforcing or recognizing a certain Agreement of February 18, 1941 or Supplement May 12, 1941, negotiated by the Brotherhood for the whole craft of firemen; for an injunction against the Brotherhood acting as his representative under the Railway Labor Act so long as it refused to give him notice, opportunity to be heard, or voice in the formation of policy adversely affecting his

interests, or so long as it discriminated against the Negro minority nonmembers in favor of its white majority members; a declaratory judgment establishing the rights, status and other legal relations of the parties; damages and discovery (R. 96 to 97). Petitioner sued in his individual capacity and as representative of the Negro firemen employed on respondent Railroad as a class (R. 84).

Petitioner holds seniority as a fireman on the S. & N. A. Division from March 5, 1910. When the Substituted Amended Complaint was filed he was 55 years of age, in perfect health, able and ready to work, and had worked to the complete satisfaction of the Railroad without a demerit in the past 16 years. From December 28, 1921 to April 8, 1941 he was in road passenger service (R. 85). Prior to the passage of the Railway Labor Act down to April 8, 1941 he was in the South End Passenger Pool, one of the best jobs in his seniority district (R. 91). His contract of employment included the terms of the collective bargaining agreement between the Railroad and its firemen and hostlers dated March 1, 1929 (R. 86; 146) which provided in part that in assignment of runs preference should be given to the oldest fireman in road service when competent and worthy (R. 153).

The white Brotherhood members constitute the majority firemen on the entire Railroad system and ever since the passage of the Railway Labor Act have designated the Brotherhood as the representative for purposes of the Act of the entire craft or class of firemen on the Railroad (R. 86). The Negro minority firemen and the white Brotherhood-member majority firemen constitute the entire craft or class of firemen on the Railroad (R. 86). Negro firemen are excluded from the Brotherhood by constitution and ritual solely because of race (R. 83). The Negro firemen were never given the opportunity to participate in the selection of a representative for the entire craft or class of firemen

and do not know how the Brotherhood was chosen (R. 86); but by virtue of their minority position they have been compelled to accept the Brotherhood as their representative under the Railway Labor Act (R. 87) and they did accept the Brotherhood as their representative assuming it would act without fraud or discrimination and relied on it for protection in collective bargaining and handling of grievances (R. 87).

By accepting the designation as representative and asserting the exclusive right to represent the entire craft or class of firemen under the Railway Labor Act, the Brotherhood placed itself in a confidential relationship with each fireman in the craft, and was under a duty to represent him impartially, to give him notice, opportunity to be heard and a chance to vote on any proposed policy adversely affecting his interest; to make prompt and full disclosure of all actions taken by it and not to discriminate against a non-member in favor of itself and its members. Yet it has been persistently hostile to the Negro firemen and has sought to drive them out of service in order to create a monopoly of employment or the best jobs for its own members, regardless of seniority, competence or worth. It has refused to give the Negro firemen notice, opportunity to be heard or vote on matters of policy affecting their interests adversely, or to report its actions, or to handle their grievances wherever there is a conflict of interest between them and the Brotherhood members; or to give them fair, honest representation under the Railway Labor Act (R. 87-88).

March 28, 1940, without notice to the Negro firemen or giving them a chance to be heard or to vote on the matter, the Brotherhood, acting as representative of the entire craft of firemen under the Railway Labor Act on each of the 21 railroads mentioned therein, served a Notice as provided under the Act for modification of existing collective bargaining agreements (R. 88). The Brotherhood proposals

aimed at driving the Negro firemen *completely out of the service of the railroads and creating a closed shop for its own membership.* It proposed

> "1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.
>
> "2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.
>
> "3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them" (R. 59).

Under railroad practice, engineers are chosen by promotion from the ranks of firemen. Negroes are never promoted from firemen to engineers. Hence, in railroad parlance, white firemen universally are called "promotable men"; Negroes designated as "non promotable men" (R. 89).

Without notice to the Negro firemen or opportunity for them to be heard, the Brotherhood and the railroads, after negotiations pursuant to said Notice, entered into an Agreement February 18, 1941 (R. 90) seriously curtailing Negro firemen's employment and seniority rights: restricting their employment to seniority districts they were then working on, providing that in such seniority districts they should not exceed fifty per cent in each class of service on the district and that until such percentage should be reached only promotable men should be hired and all new runs and vacancies filled by promotable men. The Agreement further reserved the right of the Brotherhood to press for more restrictions on Negro firemen's employment on individual carriers (R. 10-13). On May 12, 1941 the respondent Railroad and the Brotherhood acting again as representative of the entire craft of firemen under the Railway Labor Act, without notice to the Negro firemen, negotiated a supplementary agreement for the practical administration of the Agreement of

February 18, 1941, and providing *inter alia* that the Brotherhood firemen should get the odd job in each class of service (R. 13-21).

The Brotherhood never reported the fact of the Notice, the Agreement or the supplementary agreement to the Negro firemen; the Railroad and Brotherhood put same into effect without notice to the Negro firemen (R. 90).

Although Negro firemen constituted the minority firemen on the entire respondent Railroad system, they constituted more than fifty per cent on the S. & N. A. Division and three other seniority districts (R. 86). Prior to the passage of the Railway Labor Act and down to April 8, 1941, as above noted, petitioner was in the South-End Passenger Pool, composed of six firemen (five Negro and one white). April 8, 1941 the Pool was reduced to four firemen; and although petitioner and two other Negro firemen were entitled to remain in the Pool by reason of seniority, competence and worth, yet the Railroad and the Brotherhood pursuant to said Agreement of February 18, 1941 arbitrarily disqualified all the Negro firemen and reformed the Pool with four white Brotherhood member firemen, all junior to petitioner and no more competent or worthy (R. 92).

In consequence petitioner was completely out of work for 16 days; then had to take a more arduous, less remunerative job on a local freight (R. 93). Thereafter on December 22, 1941 the Railroad and the Brotherhood under said Agreement and supplement *supra* took that job away from him, replaced him by a Brotherhood member junior to him, no more competent or worthy, and in spite of the fact no complaint had been made about his work. As a result he had to take a job firing a switch engine, which was even worse than local freight (R. 93). He stayed on the switch engine until January 3, 1942 when he was reassigned to the South-End Passenger Pool (R. 93); but the Agreement and Supplement still remain in effect.

Petitioner appealed for relief and redress to the highest operating officer of the Railroad and to the general officers of the Brotherhood without effect, and has exhausted his remedies within the Railroad and the Brotherhood.

On demurrers filed by the respondents, the Circuit Court dismissed the Substituted Amended Complaint, holding

> "The contract of 1941 appears on its face as one designed to increase the number of promotable firemen. It makes available more men who have been necessary to the proper operation of the railroad. In any event the bill fails to negative such necessity or to aver that a contract more favorable to complainant and his class was a practical possibility. The general allegations of fraud and discrimination in the execution of the contract are not assumed to be true merely because its provisions are not as favorable to the entire group of employees, or a portion thereof, as were the provisions of a former contract". (R. 125).

On appeal the Supreme Court of Alabama affirmed, holding

1. that the recent cases *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *General Committee v. M. K. T. R. Co.*, 320 U. S. 338; and *General Committee* v. *So. Pacific Company*, 320 U. S. 323, did not apply (R. 134; 16 So. 2d at p. 418);

2. that the Railway Labor Act did not intend to create a confidential relation between the representative and the workers it represents, but merely intended that there be a representative chosen by the majority to bargain for the entire craft, "*without any notion of liability to the individual*" (Italics ours; (R. 137; loc cit., p. 419), and that the representative is under no duty of notice and hearing to the minority and *can look out for the interest of its own members to the detriment of the minority.* (Italics ours; R. 142, loc. cit. at p. 422).

(c) If the two junior men in the second pool were one promotable and one non-promotable.

A. (a) The junior non-promotable man and the junior promotable man should be taken out of the pool.

(b) Seniority would govern.

(c) Seniority would govern.

31. Q. The ratio of non-promotable men to promotable men in the 2nd pool is 6 and 7. The first pool at adjustment period is reduced to two men, resulting in displacement of two men in second pool. Who should be displaced?

(a) If the two junior men were promotable?

(b) If the two junior men were non-promotable?

(c) If the two junior men were one promotable and one non-promotable?

A. (a) The junior non-promotable and the junior promotable men would be taken out.

(b) Seniority would govern.

(c) Seniority would govern.

32. Q. The ratio of non-promotable men is 6 and 8 in the second pool. The first pool at adjustment period is reduced 2 men, resulting in displacement of two men in second pool. Who should be displaced:

(a) If the two junior men were promotable?

(b) If the two junior men were non-promotable?

(c) If the junior men were one promotable and one non-promotable.

A. (a) Seniority would govern.

(b) Seniority would govern.

(c) Seniority would govern.

33. Q. The ratio of promotable men to non-promotable men is 6 and 6. There is a vacancy as hostler and no bids received, and the junior promotable fireman is assigned.

If it is necessary to fill the latter's place in second pool, should the non-promotable or the promotable cut off fireman be assigned to the pool?

A. Senior promotable cut off men should be assigned.

34. Q. The ratio of non-promotable firemen in second pool is 6 and 7. A vacancy as hostler is advertised and no bids received, the junior promotable fireman being assigned. It is necessary to fill the latter's place. Should the senior promotable or non-promotable fireman be added to the second pool?

A. The senior cut off promotable fireman should be added.

35. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 8. A vacancy for hostler is advertised and no bids received, the junior promotable firemen being assigned. It is necessary to fill the latter's place. Should the senior promotable or non-promotable cut off fireman be added to the second pool?

A. The senior cut off should be added.

It is understood by both parties to this agreement that it became effective March 15, 1941, and no transaction that took place prior to March 15th is considered as coming under the terms of Washington Mediation Agreement of February 22, 1941.

Accepted for the L. & N. Railroad Co. by

(S.) R. C. Parsons,
*Director of Personnel.*

Accepted for the Employes

(S.) W. G. Metcalfe,
*General Chairman, B. L. F. & E.*

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# Supreme Court of The United States

October Term, 1943.

No. ~~820~~ 45

BESTER WILLIAM STEELE,
*Petitioner*,

*vs.*

LOUISVILLE & NASHVILLE RAILROAD CO.
a corporation;
BROTHERHOOD OF LOCOMOTIVE
FIREMEN & ENGINEMEN,
W. H. THOMAS, J. P. ADAMS and B. F. McGILL.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 826

BESTER WILLIAM STEELE,
*Petitioner,*

*vs.*

LOUISVILLE & NASHVILLE RAILROAD CO., a corporation;
BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
W. H. THOMAS, J. P. ADAMS and B. F. McGILL.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THE JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment or decree of the Supreme Court of Alabama, which petitioner seeks to have reviewed, was rendered by the Supreme Court of the State of Alabama January 13, 1944 (R. 131), affirming a decree

of the Circuit Court of Jefferson County, Alabama, in Equity, in the cause of Bester William Steele, Complainant, v. Louisville & Nashville Railroad Company, a corporation, Brotherhood of Locomotive Firemen & Enginemen, W. H. Thomas, J. P. Adams and B. F. McGill, Respondents, sustaining demurrers of the respondents to petitioner's bill of complaint and dismissing said bill of complaint. The opinion and decree of the Circuit Court of Jefferson County in Equity is shown in the record (R. 124, 125, 126). The opinion of the Supreme Court of Alabama is shown in the record (R. 131 to 144) and is reported in 16 So. (2d) 416.

## JURISDICTION

Petitioner states that the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347). Since jurisdiction under such section is confined to a review of judgments or decrees rendered by Circuit Courts of Appeal or the Court of Appeals of the District of Columbia, it is assumed that petitioner's reference was inadvertently made, and that the petition was intended to be filed pursuant to the provisions of Section 237 of the Judicial Code as amended by Act of February 13, 1925, 43 Statutes 939 (Sec. 344, Title 28 U. S. C.).

## STATUTE INVOLVED.

Petitioner states that the statute involved is the

Railway Labor Act (Act of May 20, 1926, as amended by the Act of June 20, 1934 (45, U. S. C. Section 151-164).

## STATEMENT OF THE CASE

The petitioner, as complainant, filed his bill of complaint (R. 84) in the Circuit Court of Jefferson County, Alabama, in Equity, against the Railroad, the Brotherhood and certain individual representatives or members of the Brotherhood. In this bill petitioner alleged that he was a Negro fireman employed by the Railroad and that he sued on behalf of himself and as representative of all other Negro firemen and helpers employed by said Railroad.

The bill alleged that petitioner was fifty-five years of age, in good health and had been employed as a locomotive fireman for the Railroad since February 4, 1910, and had acquired certain seniority rights under a collective bargaining agreement between the Railroad and its Locomotive Firemen and Hostlers, dated March 1, 1929 (R. 85-86); that white firemen constituted a majority of the craft or class on the Railroad as a whole, although on certain divisions the Negro firemen constituted a majority (R. 86); that since the passage of the Railway Labor Act the Brotherhood, which only admits white men to membership therein, has acted as the bargaining agent or representative of the entire craft or class; that the Negro firemen have never been given an opportunity to participate in the choosing of such representative, but by reason of their minority position they were compelled to, and did accept the Brotherhood as such representa-

tive under the Railway Labor Act (R. 87); that the Brotherhood thus assumed a confidential relation with each fireman and undertook the performance of a fiduciary duty to represent them impartially in good faith; that it therefore became the duty of such representative to give each fireman reasonable notice of any action proposed by such representative which might be adverse to his interest, with an opportunity to be heard and a chance to vote thereon; to make full disclosure of actions, not to discriminate between members of the class, and generally to conform to the rules of law governing the relations existing between principal and agent (R. 87, 88).

After averring a general purpose and course of conduct alleged to be hostile and disloyal to petitioner and the minority group represented by him, in violation of the alleged duties of the Brotherhod as such representative, it is alleged that on March 28, 1940, in fraud of the petitioner and other Negro firemen, without notice, hearing or vote, the Brotherhood, as such representative under the Railway Labor Act, served on the Railroad a notice or request for certain changes in the existing collective bargaining agreement of March 1, 1929, and asked for a conference for the consideration of such proposed changes. (R. 88,—for copy of notice of March 28, 1940, see R. 59 and 60).

After negotiations pursuant to the notice dated March 28, 1940, it is alleged that the Brotherhood, as such representative under the Railway Labor Act, negotiated an amendatory agreement dated February 18, 1941 (R. 10, 11, 12 and 13), and on May 12, 1941, ex-

ecuted a supplemental agreement pursuant to the terms of the agreement of February 18, 1941 (R. 13 to 21).

The amendatory agreement of February 18, 1941 (effective February 22, 1941) contained, among other things, the following provisions:

"(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

"(2) The above percentage shall be reached as follows:

"(a) Until such percentage is reached on any seniority district only promotable men will be hired.

"(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

"(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen or helpers on other steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

"(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present

rules and practices to the position of locomotive engineers.

"(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. and E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

The supplemental agreement of May 12, 1941 (effective March 15, 1941) provided specifically for the application to the L. & N. Railroad of the general agreement of February 22, 1941; and comprises a detailed explanation of the operation of such general agreement.

It is alleged in the bill that such changes or modifications adversely affected the seniority rights formerly enjoyed by the petitioner and other Negro firemen.

The bill challenges the validity of the Railway Labor Act as being repugnant to the Due Process Clause of the 5th Amendment to the Constitution of the United States (Sec. 27 of the Bill, R. 95-96).

The bill sought relief as follows:

(a) To enjoin the enforcement of an alleged amendment or modification of the basic agreement negotiated between the railroad and the Brotherhood for the benefit of the firemen as a craft or class under the Railway Labor Act (Chapter 8, Title 48, U. S. C. A.) (R. 96);

(b) For discovery from the railroad and Brotherhood of certain detailed information with re-

spect to the earnings of firemen alleged to have received benefits under the amendment or modification of such agreement; and information with respect to the negotiations by which the alleged amendment or modification was effected (R. 96);

(c) For an injunction against the Brotherhood, its officers and agents and against the individual respondents, enjoining them from acting under the Railway Labor Act as representatives for petitioner or others similarly situated, so long as such respondents refuse to give petitioner, or such others, notice and an opportunity to be heard and an opportunity to vote on proposals adversely affecting their interests, and so long as respondents discriminate against petitioner or those similarly situated (R. 96-97);

(d) For a declaratory judgment declaring the respective rights, status and other legal relations of the parties in, to and by reason of the matters in controversy (R. 97);

(e) For $50,000.00 damages claimed by petitioner against the Brotherhood for alleged injuries sustained by him as a consequence of the alleged wrongful acts of the Brotherhood in negotiating such amendment or modification to such employment agreement (R. 97);

(f) For damages against the Brotherhood for alleged injuries sustained by other firemen similarly situated, who may appear, submit to the jurisdiction of the Court and establish their claims for damages (R. 97).

---

Demurrers of the respondents to the bill as last amended (referred to as "substituted amended complaint") were sustained, and the bill was dismissed by

a decree of the Circuit Court of Jefferson County, Alabama, in Equity, on the ground that the bill was without equity (R. 124, 125, 126), which decree was affirmed by the Supreme Court of Alabama (R. 131 to 144).

## SUMMARY OF ARGUMENT

1. No substantial Federal question is involved. The Due Process Clause of the 5th Amendment is not applicable to action of individuals.

2. It is not shown that any involuntary servitude is imposed upon petitioner in violation of the 13th Amendment. Alleged "economic servitude" is not the equivalent of "slavery" or "involuntary servitude".

3. Congress, in the enactment of the Railway Labor Act, did not undertake governmental regulation of wages, hours or working conditions.

4. The provisions under the Railway Labor Act for collective bargaining, and for the settlement of labor disputes by mediation conciliation and arbitration do not contravene the Due Process Clause of the 5th Amendment. Its beneficient provisions are nevertheless voluntary as to the employes. Their right to strike is not destroyed. Management is still in the hands of the Railroads.

5. Petitioner is not shown to have exhausted his remedies under the Railway Labor Act for the settlement of his grievance through mediation, conciliation or arbitration, which remedies were designed to exclude interference by judicial process, with exceptions

specifically provided by Congress but not here applicable.

6. The alleged cause of action does not arise under Federal law. The Court properly held that a Court of Equity would not enforce specific performance of the alleged employment contract or seniority rights thereunder. Recovery was sought under State law, and as no equitable ground of jurisdiction was found to exist—his claim for damages involving only an action for which there was an adequate remedy at law—the bill in equity was properly dismissed.

## ARGUMENT.

### I

*The attack upon the validity of the Railway Labor Act on the ground that it is in violation of the Due Process Clause of the 5th Amendment to the United States Constitution presents no substantial Federal question.*

The Railway Labor Act has, in numerous cases, been decided by this Court to be a valid enactment under the Commerce Clause of the Constitution. Since the constitutionality of this Act has been so thoroughly settled by this Court, the attempt of petitioner to have the decision of the State Court in this case reviewed upon the alleged ground that the Act violates the Due Process Clause of the 5th Amendment is entirely without merit. The validity of the Railway Labor Act has been established in the following decisions of this Court:

*Switchmen's Union of North America, etc. v. National Mediation Board, et al*, 64 S. Ct. 95.

*General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri, Kansas, Texas Railroad Company, et al*, 64 S. Ct. 146.

*General Committee of Adjustment of Brotherhood of Locomotive Engineers, et als vs. Southern Pacific Company, et als*, 64 S. Ct. 142.

*Brotherhood of Railway and Steamship Clerks, et al vs. United Transport Service Employees of America*, 88 L. Ed. 153, 64 S. Ct. 260.

*Virginia Railway Co. v. System Federation*, 300 U. S. 515.

*Terminal Railroad Association v. Brotherhood of R. Trainmen*, 318 U. S. 1, 6; 87 L. Ed. 571.

See, also:

*Washington Terminal Co. v. Boswell*, 124 Fed. (2d) 235.

The reasons assigned in the bill in support of the contention that the Railway Labor Act is in conflict with the Due Process Clause of the 5th Amendment are specified as follows:—

(a) So far as it attempts "to confer on the majority of a craft or class of railway employees the power to choose the representative for the entire craft or class"; and

(b) So far as it attempts "to confer on said representative unbridled and absolute power to destroy minority property rights in favor of the majority". (R. 95-96).

The first specification challenges the validity of the Act in setting up machinery under which any craft or class of employees may, by a majority vote, choose a representative for the purpose of collective bargaining. This challenge is answered with finality in the cases hereinabove cited in which this Court has upheld the validity of this legislation in providing a means for the settlement of labor disputes in this field by mediation, conciliation and arbitration, supplemented by certain legal sanctions in the enforcement of the declared policy of the Act. Although the right to strike was not taken away, the right or principle of collective bargaining was made enforceable by judicial process. Petitioner's attack upon the principle of collective bargaining or upon the provisions for collective bargaining, by majority action of each separate craft or class, as contained in the Railway Labor Act, does not present a substantial Federal question. The Federal questions are too well settled. Nor is this Court given jurisdiction to review the decision of the State Court by the bare averment of a Federal question. In such case the mere allegation of the Federal question is treated as fictitious or frivolous.

*Gully v. First National Bank*, 299 U. S. 109.

*Hoffman v. Hanan* (N. Y. 1937) 57 S. Ct. 350; 300 U. S. 14; 81 L. Ed. 476.

*Seaboard Air Line Ry Co. v. Watson* (1932) 53 S. Ct. 32; 287 U. S. 86; 77 L. Ed. 180.

*Mullinger v. Hartupee* (Pa. 1868) 73 U. S. (6 Wall.) 258, 18 L. Ed. 829.

*Twitchell v. Pennsylvania* (Pa. 1869) 7 Wall. 321; 19 L. Ed. 223.

*St. Louis, C. B. & Ft. S. Ry. Co. v. Missouri* (Mo. 1895) 156 U. S. 478, 15 S. Ct. 443, 39 L. Ed. 502.

*Hamblin v. Western Land Co.* (Iowa 1893) 147 U. S. 531, 13 S. Ct. 353, 37 L. Ed. 267.

The second specification in the bill, that the Railway Labor Act fails to provide due process in so far as it attempts to confer upon the bargaining representative so chosen under the Act "unbridled and absolute power to destroy minority property rights in favor of the majority" is patently frivolous. Such contention is couched in unwarranted conclusions of the pleader and likewise presents no substantial Federal question.

The representative is not chosen by Congress; and the Act is not in any sense a grant of governmental power or authority to the representative. It only recognizes a fundamental right for which organized labor, and in fact all groups of employees have struggled throughout the years. Furthermore, even the violation by an official of a duty imposed upon him by statute does not demonstrate the invalidity of the law, but to the contrary merely invalidates the act of the individual. Assuming for the sake of argument, that the bargaining representative violated a duty imposed upon it by law (which we by no means concede to be the case here involved), such abuse of power would not invalidate the Act. But that is not the case here for the reason, first, the representative is not chosen or appointed by Congress, but by the employees—by a ma-

jority of the craft or class to which petitioner belongs; and, second, the alleged breach of duty by the representative is alleged as a mere conclusion of the pleader, for it is not shown that the Railroad would have accepted a different proposal, or that the majority were willing any longer to continue in force the former agreement without precipitating a labor dispute between the promotable firemen and the Railroad or between the promotable firemen and the non-promotable firemen.

If petitioner's complaint is with respect to the choice of the representative, or as to the craft or class designated for such purposes, we find that Congress has provided in Section 2, Ninth, for the determination of such disputes by the National Mediation Board in the exercise of an adjudicatory function, enforceable by judicial sanctions.

*Missouri, K. T. R. Co. case, supra.*

*Virginia R. Co. case*, 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

A complete answer to the contentions of petitioner that the Railway Labor Act violates the Due Process Clause of the 5th Amendment is contained in the opinion rendered by Mr. Justice Jackson in the case of *Terminal Railroad Association v. Brotherhood of R. Trainmen*, 318 U. S. 1, 6; 87 L. Ed. 571, wherein he said:

"The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working

conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."

In the "Questions Presented" by petitioner in his petition (page 8) an effort is made to change somewhat the ground of attack on the constitutionality of the Railway Labor Act. In question number 2 (p. 8 of the petition) the question is posed as to whether or not the "grant of power by Congress" to the representative who may be chosen under the Act, is subject to the restraints of the 5th Amendment.

That question is answered in the case of *Terminal R. R. Association v. Brotherhood of R. Trainmen, supra*, where it is emphatically stated that the Act "does not authorize anyone to fix" working conditions; and it is in no sense a grant of governmental power or official authority.

Prior to the adoption of the Railway Labor Act the petitioner's wages, hours and working conditions were left to negotiation by individual contracts of employment, with an unprotected right to bargain collectively, or were left to enforcement by strikes. Under

the Railway Labor Act he has the benefit of the principle of collective bargaining, with added sanctions; and pursuant to this Act he acquired certain seniority rights, under the agreement of March 1, 1929; and enjoys the seniority rights accorded him under the agreements of February 22, 1941, and May 12, 1941. As expressed in *Washington Terminal Company v. Boswell, supra*, the Railway Labor Act was designed "not to outlaw the right to strike but merely to prevent the necessity for its exercise".

The petitioner was not orginally employed, nor is he now employed, pursuant to the mandate of any statute. His employment contract is a private contract, and it is not shown that any constitutional rights, privileges or immunities of petitioner are infringed by the terms or provisions of the Act.

Neither the adoption of the principles nor the machinery for the applying of such principles of mediation, conciliation and arbitration of labor disputes as contained in the Railway Labor Act constitutes a denial of due process. Its provisions have been construed as entirely voluntary. (See *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. Rep. 754.)

Prior to the Railway Labor Act there was no judicial process for the settlement of wages, hours or working conditions of the employees, therefore no due process is denied by the Act. Surely no one in this day may successfully attack the principle of collective bargaining as involving a denial of due process of law.

The substance of petitioner's attack goes to the point that he is dissatisfied with the representative

chosen by a majority of the craft or class involved, or is dissatisfied with the manner in which the representative is discharging the duties imposed upon it; or is dissatisfied with the manner in which the representative of such craft or class is chosen. Although petitioner does not directly challenge the validity of the method pursued of placing all firemen employed on the Railroad within one class or craft for the choosing of a bargaining representative, he inferentially seeks to have the Negro firemen placed in a separate class or craft or to have the firemen employed on the several divisions of the Railroad placed in separate classes or crafts, and thus obtain separate bargaining representatives for the Negro firemen under the Railway Labor Act. But this Court has decided that these are questions delegated by Congress for determination by the National Mediation Board and not by the Court.

If the petitioner was entitled to such relief, it is not shown that he has exhausted the remedies provided by the Railway Labor Act. He goes no further than to allege that he protested to the Railroad and Brotherhood and appealed such protests to certain officers of the Railroad and Brotherhood. (R. 93-94).

The Act expressly provides "for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions"; and "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions". (Title 45 U. S. C., Sec. 151 (a)). The general duty of settling labor disputes is imposed upon both carriers and employees (Title 45, U. S. C., Sec.

152, First). The First Division of the National Railroad Adjustment Board is expressly given jurisdiction over disputes involving firemen. (Title 45 U. S. C. Sec. 153, First, (h), (i)). Under this section provision is made for a hearing in person or by counsel (j). Such award, when made, is final and binding upon the parties to the dispute (m). If the carrier does not comply such compliance may be enforced by an action in the District Court of the United States (p).

The Act contains further provisions for the settlement of labor disputes by mediation before the National Mediation Board (Sec. 155). If not settled by conference, or by the Adjustment Board or through mediation, provision is made for arbitration under Sections 157, 158 and 159. But petitioner is not shown to have exhausted such redemies under the Railway Labor Act.

II

*The negotiation of the amendatory agreement of February 18, 1941, and supplemental agreement of May 12, 1941, did not constitute denial of due process of law under the 5th Amendment, nor impose involuntary servitude in violation of the 13th Amendment.*

Since the constitutionality of the Railway Labor Act has been thoroughly established, it follows that agreements made pursuant thereto are valid. If a dispute arises with respect to the designation of a class or craft, the choosing of a representative therefor, or with respect to any agreement negotiated by such representative, or the construction or operation thereof, such dispute may be settled by voluntary action through medi-

ation, conciliation or arbitration, or the employee or group involved may resort to economic pressure or strike—the same powers he had before the adoption of the Act.

The mere abuse of powers or duties imposed upon any official representative or board or body is insufficient to show invalidity of the statute itself. An abuse or disregard of power or authority granted by a statute has never been held to invalidate the statute, whatever may be the remedies which the injured party may have against the person or official so violating its terms.

The 5th Amendment does not relate to the action of individuals. Its restraint is upon Congress, similar to that imposed upon the states under the 14th Amendment. It "is a limitation only upon the powers of the general government".

*Talton v. Mayes*, 163 U. S. 376, 382; 41 L. Ed. 196-198; 16 S. Ct. 986.

*Corrigan v. Buckley*, 271 U. S. 323; 70 L. Ed. 969.

*Teague v. Brotherhood of Railroad Firemen and Enginemen*, 127 Fed. (2d) 53.

*National Federation of Railway Workers v. National Mediation Board*, 71 App. D. C. 266, 110 Fed. (2d) 529, 537.

*National Labor Relations Board v. Washington Virginia and Maryland Coach Company*, C. C. A. 1936, 85 Fed. (2d) 990, affirmed 57 S. Ct. 648, 301 U. S. 142, 81 L. Ed. 965.

*S. Buchsbaum & Co. v. Beman*, D. C. Ill. 1936, 14 F. Supp. 444.

*Texas Electric Ry. Co. v. Eustus*, D. C. Texas 1938, 25 F. Supp. 825, affirmed, 60 S. Ct. 134, 308 U. S. 512; rehearing denied, 60 S. Ct. 258, 308 U. S. 637, 84 L. Ed. 529.

*Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 140 Fed. (2d) 35, (in which Petition for Certiorari to this Court is now pending).

The contention that the giving of the notice of March 28, 1940, or the negotiation of the agreement of February 18, 1941, and supplemental agreement of May 12, 1941, may be construed as violating any right or immunity of the petitioner guaranteed under the 13th Amendment is patently frivolous. No such Federal question is shown to have been raised in the trial court or in the Supreme Court of Alabama. The 13th Amendment prohibits "slavery" or "involuntary servitude". Neither of these terms has in any instance been construed as prohibiting "economic servitude"; and it would be difficult to conceive of the effect or the consequences if the terms "economic servitude" were substituted for "involuntary servitude". Petitioner cannot claim that involuntary servitude in any sense is imposed under the Railway Labor Act, for the reason that Section 159, Eighth, Title 45 U. S. C. A., expressly protects petitioner against any possible involuntary service. This provision reads as follows:

> "Eighth. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual

employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

The petitioner misconceives the notice requirement under the Railway Labor Act and under the collective bargaining agreement of March 1, 1929 (Article 43 of the agreement). (R. 168). The notice requirement under the Act provided in Section 156 (Title 45, Sec. 156, U. S. C.) is thirty days' notice to be given by a carrier to the bargaining representative or by the representative to the carrier. The provisions of the agreement of March 1, 1929, follow this statute and were complied with in the notice of March 28, 1940. This construction of the statute is supported in the case of *Illinois Central Railway Company v. Moore*, 112 Fed. (2d) 959-966, reversed on other grounds in *Moore v. Illinois Central Railway Company*, 312 U. S. 630, 61 S. Ct. 754.

## III

*The alleged unfair action of the Brotherhood as representative of the firemen under the Railway Labor Act does not present a substantial Federal question.*

The settlement of all labor disputes involving interstate commerce, including such questions as the designation of crafts and classes, the choosing of bargaining representatives, the agreements thus negotiated, and the construction thereof, is a matter for mediation, conciliation or arbitration under the machinery provided

by the Railway Labor Act, and interference by judicial process has been excluded, with exceptions not here involved.

The case of *Brotherhood v. United Transport Service Employees of America, supra,* on the facts, presented a contention similar to that made by the petitioner in this case. There the Negro "redcaps" complained of action taken by the Brotherhood as representative under the Act, on the ground that the Negro "redcaps" were not permitted membership in the Brotherhood and were therefore entitled to a separate classification in the exercise of their choice of a bargaining representative. This the Mediation Board denied, and, upon application to the District Court, the action of the Mediation Board was set aside. The decision was affirmed by the Court of Appeals for the District of Columbia. After granting certiorari, this Court reversed on the authority of the *Missouri, Kansas and Texas case; supra,* the *Southern Pacific case, supra,* and the case of *Switchmen's Union v. National Mediation Board, supra.*

The rule was followed in the case of *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, No. 702,* now pending before this Court on application for writ of certiorari.

However, any cause of action which might accrue to petitioner, by reason of an alleged wrongful act of the Brotherhood as the representative of his class or craft (which we do not concede to be the case), would not constitute an action arising under the Federal statute, but would constitute an action under State Law.

*Teague v. Brotherhood of Locomotive Firemen & Enginemen, supra.*

*Gully v. First National Bank, supra.*

*Barnhart v. Western Maryland Ry. Co.*, C. C. A. Fourth, 128 Fed. (2d) 709.

*Burke v. Union Pacific Ry Co.*, C. C. A. Tenth, 129 Fed. 2d. 844.

Petitioner's attempt to draw an analogy between provisions in the Railway Labor Act for the choosing by the employees of a representative, by majority vote, for collective bargaining purposes, and the provisions of State statutes under which power to control elections has been construed as having been delegated by the State to agencies permitted to prescribe qualifications for voting, contrary to the 15th Amendment, runs far afield of the questions in this case, for these reasons:

a. This Court has decided that these provisions in the Railway Labor Act do not confer governmental power, and therefore do not constitute a grant of power (*Terminal Railroad Association v. Brotherhood of R. Trainmen, supra*).

b. The representative becomes the chosen agent of the employees and not an agency of the Government.

c. The provisions for the determination of the voting unit (craft or class of employees), the supervision of such voting, and the determination of the result by the National Mediation Board, coupled with provisions to enforce compliance with the findings of

the Board; do not violate due process nor infringe any constitutional right.

d. There is no discrimination permitted in the voting within a craft or class.

e. Both the employment and the acceptance of the provisions of the Act by the employee are voluntary.

f. Congress is without power to prevent discrimination by the Railroad in its employment of labor. The 15th Amendment has no application thereto; nor does the discrimination of the individual employer violate due process.

g. The bargaining representative is without power to destroy the individual employer's right to discriminate in its employment of the members of any race, nor is such power vested in Congress.

Cases involving construction of State election statutes permitting discrimination between voters by reason of race, in violation of the 15th Amendment, are clearly inapplicable to any question involved in this case. Discrimination in private employment is not forbidden by the Constitution, but is a right which may not be disassociated from freedom itself. It is not on a parity with discrimination against the exercise of the citizen's right to vote.

## IV

*Jurisdiction for review by writ of certiorari in this case is lacking for the further reason that the cause*

*of action sought to be enforced (although improperly plead) is one under State law.*

The reasoning underlying the decision of the Supreme Court of Alabama is as follows:

(a) It followed the decisions of this Court to the effect that the Due Process Clause of the 5th Amendment does not apply to the action of individuals (*Corrigan v. Buckley, supra*).

(b) That the bill in effect sought the specific performance of the terms of the original agreement of March 1, 1929, contrary to established rules of equity. (*Hewitt v. Magic City Furniture Co.*, 214 Ala. 265, 107 S. 745, 44 A. L. R. 1441; *Donovan v. Travers*, 285 Mass. 167).

(c) That no Federal question was properly presented (*Teague v. Brotherhood of Locomotive Firemen & Enginemen*, 127 Fed. (2d) 53; *Gully v. First National Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96).

(d) That the amendatory agreements negotiated by the Brotherhood as representative of the class or craft to which petitioner belonged were pursuant to the procedure prescribed by the Railway Labor Act, and were binding upon the Railroad and upon the petitioner as a member of such craft or class, under the facts alleged in the bill. Such construction appears to be in accord with the decisions of this Court in the cases of *Switchmen's Union v. National Mediation Board, supra*; *Missouri, Kansas & Texas case, supra*, *Southern Pacific case, supra*, although the conclusion

was reached upon different grounds than as expressed in such cases.

(e) That the bill did not contain a sufficient allegation of facts to support any charge of fraud; that fraud is never presumed and is not permitted to be alleged by way of conclusion. (*Winn v. Winn*, 242 Ala. 324, 6 So. (2d) 401; *Birmingham Trust & Savings Co. v. Shelton*, 231 Ala. 62, 163 So. 593; *Broom v. Douglas*, 175 Ala. 268, 57 So. 860, 24 Am Jur. 88.)

(f) The Court held that a proper action would lie by an employee against a third person for an unlawful invasion or interference with the employment contract or seniority rights. (*Shaup v. Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327; *U. S. Fidelity Co. v. Millonas*, 206 Ala. 147, 89 So. 732, 29 A. L. R. 520).

In the *Shaup case, supra*, the Court held that a bill in equity would not lie to enforce seniority rights. In the *Millonas case supra*, the action for interference with the employment was an action at law for damages, for wrongfully procuring the discharge of the employee. Since the remedy in an action at law for damages is adequate, the bill was clearly without equity. Furthermore, it is the settled rule in Alabama that when equitable jurisdiction is found to be wanting the cause may not be retained merely for the purpose of awarding monetary damages, for the reason that the complainant has therefor an adequate remedy at law. (*Yancey v. Taylor*, 218 Ala. 235, 118 So. 271; 30 C. J. S. 425, Sec. 72, p. 427, Sec. 73.)

## CONCLUSION

For the foregoing reasons there does not appear to be any substantial Federal question which would support the jurisdictional requirements for the granting of a writ of certiorari in this case; the petition should therefore be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief and argument was mailed, postage prepaid, to Arthur D. Shores, Masonic Temple Building, Birmingham, Alabama, and Charles H. Houston, 615 F Street, N. W., Washington, D. C., Counsel for Petitioners, on the ..... day of May, 1944.

JOHN W. LAPSLEY,

Of Counsel for Respondent,
Brotherhood of Locomotive
Firemen and Enginemen.

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No. 45.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

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BESTER WILLIAM STEELE, - - - - - Petitioner,

*versus*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMAN AND ENGINEMEN, ET AL., - - - - Respondents.

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On Certiorari to the Supreme Court of Alabama.

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## BRIEF FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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*Attorneys for Louisville & Nashville Railroad Company.*

November, 1944.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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OCTOBER TERM, 1944.

No. 45.

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BESTER WILLIAM STEELE, - - - *Petitioner,*

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LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL., - - - *Respondents.*

---

*On Certiorari to the Supreme Court of Alabama.*

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## BRIEF FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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### STATEMENT OF CASE.

At the time of the preparation of this brief, the Respondent, Louisville & Nashville Railroad Company, has not been served, and is without brief of petitioner on merits; wherefore it is necessary to make a statement of the case.

## ORIGINAL COMPLAINT AND DEMURRER THERETO BY RAILROAD.

The original Bill in this cause was filed in the Circuit Court of Jefferson County, Alabama, in Equity by Bester William Steele, as complainant v. Louisville & Nashville Railroad Company, a corporation, and Brotherhood of Locomotive Firemen and Enginemen, an unincorporated Association, Respondents, on August 30, 1941 (R., p. 3).

To this complaint the Louisville & Nashville Railroad Company filed demurrer (R., pp. 21 and 30), and on January 21, 1942, demurrer was sustained by decree of the Circuit Court, and complainant allowed 30 days within which to amend. The bill was twice amended (R., pp. 49 and 77) and dismissed upon complainant being authorized to file a Substituted Bill in said cause (R., p. 82), which was filed August 14, 1942 (R., p. 83).

On April 27, 1943, demurrer of the Respondents was sustained to Substituted Bill, and Bill dismissed (R., pp. 124, 126), from which ruling complainant took an appeal to the Supreme Court of Alabama, where decree was rendered January 13, 1944, affirming the decree of the Circuit Court, and opinion rendered (R., p. 131). 245 Ala. 113, 16 So. (2) 416. Petition for writ of Certiorari to the Supreme Court of Alabama filed in this Court on March 29, 1944, granted May 29, 1944.

## SUBSTITUTED AMENDED COMPLAINT.

Substituted Amended Complaint (R., p. 83) filed by Bester William Steele, a negro fireman on the S. & N. A. Division of the L. & N. R. R. Co. (hereinafter designated Petitioner) on behalf of himself and other negro firemen of the same craft or class against the L. & N. R. R. Co., an interstate carrier (hereinafter designated as Railroad); the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated international union, whose membership is principally derived from white men, and which restricts its membership to white men, and excludes negro firemen because of race (hereinafter designated as Defendant Brotherhood); and three Chairmen of local lodges of the Defendant Brotherhood, involves as it relates to the Railroad, Respondent, primarily the questions of alleged seniority rights and job assignments of the Petitioners, under an agreement of March 1, 1929, and as amended February 22, 1941, and modified between the Railroad, Respondent, and the Brotherhood as collective bargaining agency and representative of the firemen under the Railway Labor Act hereinafter designated as Brotherhood, and in the negotiations and execution of such amended contract of February, 1941, and modification thereof in May, 1941, and seeks (1) to enjoin the enforcement and recognition of said agreement; (2) Discovery; (3) Declaratory Judgment.

Petitioner claims seniority rights dating from the time he was employed and has worked as a locomotive

firefnan, in March, 1910, averring that from December 28, 1921, to April 8, 1941, he worked as a fireman in the road passenger service on the South & North Alabama Division, when he was displaced by alleged wrongs of the Railroad and the Brotherhood (R., p. 85).

Petitioner claims to be in perfect health; to at all times have performed his duties as locomotive fireman, loyally and efficiently to the best interest of the Railroad; and avers his original employment with the Railroad was under an individual contract of hiring between himself and the Railroad, which contract, however, has been modified from time to time by mutual agreement between the Petitioner and the Railroad; and Petitioner avers his contract embodies the terms of collective bargaining "Agreement between the L. & N. R. R. Co. and Its Locomotive Firemen and Hostlers," issued March 1, 1929 (R., p. 86).

Reference to this Agreement of March 1, 1929, shows that it contains provisions as follows:

> "Article 34—Duration of Agreement.
>
> "The rates, rules and working conditions as provided herein shall be continued in effect, subject to thirty days' written notice by either party,"

That the negro firemen constitute a majority of firemen employed on the South and North Alabama Division, while the Brotherhood Member Firemen constitute a majority of the total number of firemen employed on the entire System of the Railroad; that the negro firemen and the Brotherhood member firemen together

constitute the entire Craft or Class of firemen employed by the Respondent Railroad (R., p. 86).

That the Brotherhood has a majority of firemen on the System, and its membership, since the passage of the Railway Labor Act, has chosen the Brotherhood as the Representative of the entire Craft or Class of firemen employed by the Railroad; that the Brotherhood has claimed the exclusive right to act, and has acted as the "Exclusive Bargaining Agent and Grievance Representative of the entire Craft or Class" (R., p. 86), and its members have individually and collectively claimed the benefits of its actions as such. That the negro firemen have never been given an opportunity to nominate or participate in the choosing of a representative under the Railway Labor Act, but by virtue of their *minority position* they have been compelled to accept the Brotherhood as a choice of the majority for their Statutory Representative under the Railway Labor Act for the purposes of the Act (R., p. 87). That the negro firemen did so accept the Brotherhood as their Representative under the Act for the entire Craft; and assuming that the Brotherhood would exercise its powers under the Railway Labor Act without fraud or discrimination against them, they relied on their Representative for protection of their rights in collective bargaining and handling of grievances with the Respondent, Railroad.

Negroes are only employed as firemen by railroads in the South, and constitute the minority of the entire Craft or Class of the Southern Systems. On most of the Railroads of the Southern Systems, the Firemen,

ever since the passage of the Railway Labor Act, have chosen the Brotherhood as the Representative under the Act for all firemen.

Plaintiff alleges that the Brotherhood, by accepting the designation of the "Bargaining Agent of the Firemen under the Act," and by asserting the exclusive right to represent the negroes in Collective Bargaining, and handling of grievances, has placed itself in a confidential relation with each fireman and undertaken a fiduciary duty to represent him impartially and in good faith; to give him reasonable notice and opportunity to be heard and chance to vote on any action proposed by it, adverse to his interest; and to make prompt and full disclosure of all actions taken by the Brotherhood affecting his interest, and not to discriminate against negro firemen in its, or its members' favor, because not members of the Brotherhood; and generally to properly discharge its duties as the Statutory Representative of the entire Craft, but that the Brotherhood has violated its duty by persistently being hostile and disloyal to the Petitioner, and has sought to destroy his alleged vested seniority rights, and to drive him and other negroes out of employment in order to create a monopoly employment for themselves, or to obtain for themselves favored conditions, and has refused to advise the Petitioner of matters adversely affecting his interest, and to give him a chance to be heard or vote on same; and refused to report to Petitioner its actions or to give him and other negro firemen, a fair, honest and faithful representation under the Railway Labor Act.

Petitioner avers that on to-wit: March 28, 1940, the Brotherhood, without notice to appellant and other negroes, acting through its General Chairman, and purporting to act under the Railway Labor Act on behalf of all firemen, served a notice on the Railroads to amend existing Collective Bargaining Agreements, covering the standard provisions in the *individual hiring contracts* of the individual fireman on each Railroad, aimed at driving the negro firemen completely out of the service. This notice is made Exhibit "A" to the Bill (R., pp. 59, 60).

That according to existing Railroad practice prevailing in the United States, locomotive engineers are obtained by promotion of selected white locomotive firemen, and that by tradition and universal practice negro firemen arbitrarily are never promoted to engineers; that white firemen are known under standard Railroad practice as "promotable men," and negro firemen as "non promotable."

That the Director of Personnel of the Railroad knew that the Defendant Brotherhood has always been hostile to negro firemen, and has persistently sought to destroy negro firemen's claimed seniority rights, and has attempted to drive them out of the service, to the monopolistic benefit of white firemen, the Bill averring that the aforesaid notice from the Brotherhood to the Railroad was in execution of a fraudulent, disloyal purpose of the Brotherhood.

That by virtue of the contracts entered into between the Railroad and the negro firemen, the Railroad was under duty to give preference of runs to the

oldest firemen in road service, when competent, and that the known purpose of the aforesaid Notice from the Brotherhood to the Railroad was to cause the Railroad to curtail Petitioner's seniority rights, and to breach its contract with the negro firemen to the advantage of the Brotherhood Members, and that the Railroad did violate its duty to plaintiff by entering into the agreement with the Brotherhood, effective February 22, 1941.

That in May, 1941, the Railroad and Brotherhood each acting through authorized Agents, made a modification of the February Agreement, further curtailing complainant in his seniority rights, and that in negotiating and executing said Modification, the Brotherhood purported to act as a Representative under the Railway Labor Act of the entire Craft or Class of firemen, without notice to the firemen or opportunity to them to be heard, and that the Brotherhood never reported to the negro firemen its negotiations and execution of the contract or its modifications, but the negroes learned of it from other sources.

Petitioner avers, in Paragraph 18 (R., p. 90), that in negotiating and executing the Agreement and Modification, the Railroad did conspire and confederate with the Brotherhood to curtail the seniority rights and job assignments of negro firemen in breach of existing contracts with the negro firemen to the fraudulent advantage of the Defendant Brotherhood member firemen (R., p. 91); that under the operating policy of the Railroad, practically every time a vacancy occurred on the South and North Seniority Division, or a new

run or job was created, the Brotherhood and the Railroad, in further execution of said conspiracy, arbitrarily disqualified negro firemen regardless of seniority, competency, etc., under "Color of said Agreement and Modification" (R., p. 91); and as a result the employment of negro firemen was severely curtailed and employment of Defendant Brotherhood member firemen increased, thereby unjustly enriching the Defendant Brotherhood through more dues.

Prior to the passage of the Railway Labor Act, and down to April 8, 1941, Petitioner, by virtue of his seniority, was a fireman in Road Passenger Service, assigned to the most favored South End Passenger Pool, rotating first in first out, for which he received a certain rate of pay and worked certain hours, and that on April 1, 1941, the jobs on the South End Passenger Pool were bulletined for bidding in because the number of firemen in the Pool had to be reduced after April 7, 1941, due to reduction in mileage, and then sets out a seniority list, in which the plaintiff's seniority is the oldest. That the Railroad and the Brotherhood, in further execution of said alleged conspiracy did arbitrarily disqualify the negro firemen from bidding in any Pool Job "Under Color of said Agreement and Modification," assigning the jobs to Brotherhood member firemen, solely by force of said Agreement and Modification.

That as a result of being allegedly, illegally and fraudulently barred from bidding in a Pool Job, Petitioner was completely thrown out of work for a period of about sixteen days, and thereafter had a harder and

less remunerative job, until January 3, 1942, when he was reassigned to the South End Passenger Pool, this being the job Petitioner originally had, and from which he claims he should never have been removed.

That he has exhausted his remedies through the structure of the Railroad and Brotherhood without avail, all the officers of the Railroad and Brotherhood reaffirming both the Agreement and Modification, and expressing their intention of enforcing the same.

That unless restrained by the Court, his seniority rights and job assignment will be continuously threatened, and curtailed by the Railroad and Brotherhood, acting in conspiracy under color of said Agreement and Modification, and he will be deprived of fair, honest and impartial representation by the Brotherhood.

Petitioner then asks for a discovery of certain matters which he alleges to be within the peculiar knowledge of the Railroad and Defendant Brotherhood (R., p. 94).

In Paragraph 26 (R., p. 95), Petitioner alleges an actual claim or controversy exists between Petitioner, on the one side, and the Railroad, Brotherhood, and Defendant Brotherhood member firemen on the other, as to the duties of the Brotherhood toward the negro firemen, as Representatives of the entire Craft under the Railway Labor Act; and as to the lawful force and effect, if any, of the Agreement and Modification.

That Section 2 Fourth (U. S. C. A., Section 152 Fourth of the Railway Labor Act) so far as it attempts to confer authority on the majority of a Craft or Class the power to choose Representatives for the entire

Craft or Class, and confer and bestow upon said Representatives unbridled and absolute power to destroy minority property rights in favor of the majority, violates the due process clause of the Fifth Amendment to the Constitution of the United States, and is void.

Then follows the Prayer of the Bill.

## DEMURRER OF RAILROAD.

The equity and sufficiency of the substituted Bill and its various phases was demurred to by the Railroad.

Demurrer of the L. & N. R. R. Co. to the Substituted Bill, as a whole, will be found at pages 21 to 27, inclusive, and to certain aspects thereof, pages 30 to 34, inclusive, and page 98.

Many grounds of demurrer, aside from the general demurrer to the equity of the Bill, were filed. We call particular attention to certain grounds of demurrer, *i. e.:*

(1) Petitioner fails to allege the terms of any individual contract between Petitioner and Railroad entitling Petitioner to seniority rights; (2) to the point that the Petitioner seeks the benefits of the provisions of an agreement between the Railroad and the Brotherhood of March 1, 1929, yet is unwilling to abide by its terms, provisions and conditions; (3) those grounds of demurrer taking the point that Petitioner fails to allege what the alleged conspiracy was between the Railroad and the Brotherhood, and is insufficient in

its averment of facts to sustain a charge of conspiracy but alleges conspiracy as a conclusion; (4) grounds of demurrer to the point that the action taken by the Railroad was under and by virtue of the provisions of law, namely, Railway Labor Act of June 21, 1934, wherein the L. & N. R. R. Co. had no alternative but to treat and act with the legally established Bargaining Agency of the Brotherhood under the provisions of the Railway Labor Act (R., pp. 20, 21); (5) grounds of demurrer taking the point that the Railroad acting under and in compliance with the law, could not be held as working a wrong or injury; (6) grounds of demurrer taking the point that the Railroad could not in anywise be held responsible for the creation or selection of the Bargaining Agency by employees of Defendant Brotherhood; (7) to the point that the allegations of facts in the Bill are contradictory of and repudiate the conclusions averred. (8) Also those grounds of demurrer taking the point that the agreement entered into between the Railroad and the Bargaining Agency are binding on the complainant and other individuals, and that Petitioner is not entitled to accept and receive the benefits of the Acts and Agreements of the contracting parties, and revoke and repudiate provisions and conditions of the agreement which he deems unfavorable to him. (9) Grounds of demurrer to the proposition that the Railroad did not willingly enter into any contract or agreement, prejudicial or injurious to the complainant. (10) Grounds of demurrer taking the point that the Railroad could not be considered in anywise responsible for any act of alleged

infidelity on the part of the Brotherhood to the plaintiff, and to the effect that the Bill does not allege any lack of authority upon the part of the Brotherhood to make an agreement with the Railroad. (11) To the effect that the relief sought by the plaintiff in this case would be to force the Defendant, Railroad Company to violate the law as enacted by the Congress of the United States.

Demurrer to certain aspects of the Bill shown commencing at R., p. 30.

A. To that aspect of the Bill of complaint by which the Petitioner seeks as an individual, the benefits of the alleged agreement between the Railroad and Brotherhood of March 1, 1929, on the grounds principally that plaintiff seeks the benefits of said agreement, but is unwilling to accept the provisions which he deems to be unfavorable to him (R., p. 30).

B. To that aspect of the Bill by which plaintiff admits the legality of the creation and existence of the Brotherhood as the Collective Bargaining Agency for the firemen and is unwilling to abide by its action (R., p. 31).

C. To that aspect of the Bill charging the Railroad with acting pursuant to a conspiracy between the Railroad and the Brotherhood because the Railroad only negotiated and consummated an agreement with the official Representative of the firemen under the Railway Labor Act, as required by law, and for the official acts of the Brotherhood, the Railroad is in no wise responsible (R., p. 32).

D. To that aspect of the Bill alleging restriction in membership of the Brotherhood; the Railroad being prohibited by penal statute from participating in the policies and organization of the Brotherhood, and in designating and determining its membership (R., p. 32).

E. To that aspect of the Bill charging disloyalty or breach of pledged fiduciary duty to the complainant, the Railroad owing no statutory duty to the individual Petitioner, except to treat with the Brotherhood, the Collective or Bargaining Agency of Petitioner and the firemen as a Craft or Class (R., p. 32).

F. To that aspect of the Bill alleging the making of a secret contract or agreement of February 18, 1941, there being no duty chargeable to the Railroad Company to make known to the plaintiff or any other individual fireman the making of a contract with the official Bargaining Agency, nor any duty on the Railroad to inform every fireman in its employment of the matters the two principals were negotiating.

## FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The strained and untenable theory of Petitioner that he has averred a case entitling him to protection under, and the right to invoke the Fifth Amendment to the Constitution of the United States, and therefore asserting that the Supreme Court of Alabama erred in its holding that the grant of power by Congress under the Railway Labor Act to the Bargaining Representative duly elected by the majority of the Craft was not subject to the restraints of the Fifth Amendment to the Constitution of the United States, is clearly a misconception and erroneous interpretation of the Amendment, and finds no support whatever in the Fifth Amendment, nor in state or federal cases construing the same. To the contrary, this same Craft or Class of Firemen of which Petitioner is a member, has previously urged and had denied the same contention it now makes.

> "The single question presented for adjudication is whether the complaint states a cause of action that arises under the Constitution or laws of the United States. The Constitutional provision relied upon is the Fifth Amendment, and the law is the Railway Labor Act. Accepting, as we must, the allegations of the complaint, and so assuming that the defendants entered into a secret agreement, the effect of which was to impair the seniority rights of the plaintiff and members of his class, and that the complaint states a justiciable controversy, our inquiry must be directed to whether

it is cognizable in a Federal Court. It has long been settled that a suit arises under the Constitution and laws of the United States only when the plaintiff's own statement of his cause of action shows that it is based upon a Federal law, or upon the Constitution. Louisville & Nashville R. R. v. Mottley, 211 U. S. 149, 29 S. Ct. 42, 43, 53 L. ed. 126. * * * "* * * The provisions of Sec. 2, subd. eighth make the terms of the collective bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law."

*Teague* v. *Brotherhood of Loc. Firemen, etc.*, 127 F. 2d 55.

"Nor does the plaintiff establish a basis for Federal jurisdiction by assertion of right under the Fifth Amendment. The Fifth Amendment relates but to governmental action, federal in character, not to action by private persons. Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969; National Federation of Ry. Workers v. National Mediation Board, 71 App. D. C. 266; 110 F. 2d 529, 537. Private parties acting upon their own initiative and expressing their own will, however else they may offend and their acts give rise to justiciable controversies, do not thereby offend the guarantees of the Constitution. Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 78 L. ed. 1292, 97 A. L. R. 680."

*Teague* v. *Brotherhood, etc., supra*, 56.

And by this Court in the case of *Corrigan* v. *Buckley*, it is held:

> "The 5th Amendment 'is a limitation only upon the powers of the general government,' Talton v. Mayes, 163 U. S. 376, 382, 41 L. ed. 196, 198, 16 Sup. Ct. Rep. 986, and is not directed against the action of individuals."
>
> *Corrigan* v. *Buckley*, 70 L. ed. 972, 271 U. S. 322.
> *Steele* v. *L. & N. R. R. Co.*, 245 Ala. 113.

If there should be removed from this case the Collective Bargaining Agreement of March 1929, Petitioner would have no semblance of standing in either a State or Federal Court. His entire case is founded on the Collective Agreement and modifications, and not on any unconstitutional Act of Congress exceeding its powers.

In its final analysis, Petitioner's claim is based solely on the provisions of an agreement made by and between duly authorized principals for him, and by which he has employment with the Railroad today. The Railway Labor Act makes no provision for dictating the terms of any agreement between the parties. The March 1929 Agreement made due and ample provision for a change and modification of its provisions, and confessedly this has been done on many occasions prior to the February change, solely under the provisions of the agreement, and this last change was no different in its manner of consummation than when previous changes had been effected. The Federal Statute did

not make the change compulsory on the parties, nor did it in anywise influence the provisions of the changes. Such changes as were made resulted from negotiations of the principals.

## ACCEPTED PRACTICES AND UNIVERSAL CUSTOMS ARE WRITTEN INTO CONTRACT.

If, as alleged in the Bill according to existing practice in the United States (R., p. 81), engineers are made by promoting selected white firemen, and if negro firemen accept employment as such with the Railroad under a contract of hiring which, by tradition and universal and accepted custom and practice, never permits them to be promoted to the position of engineer, then when the Railroad makes a Collective Agreement with its Employees through a legally constituted Bargaining Representative of all firemen, both white and negro, whereby there is made provision for employment, proper training and promotion of men eligible for promotion to engineers when, without such reserves, the Railroad could not operate and would not be in a position, because of lack of engineers to meet the requirements of the public, can it be truly said that the making of a contract for such contingency is improper?

It is clear from the positive averments of the Bill that at the time of the contract of hiring of plaintiff and before and since, it was traditional and the universal practice and custom of all Railroads not to use negroes as engineers (negroes are not employed on Railroads as locomotive firemen, except in the South

(R., p. 87)), therefore, there was written into the contract of hiring of Petitioner and his continuance in the service, regardless of the time in the service, an agreement that he would not be promoted to the position of engineer. So the Agreement of February 1941, and its Modification in this phase, did not deny or deprive Petitioner of a right to be promoted to an engineer, *Petitioner agreed to this at the time of his hiring* in March, 1910, and "complainant, employed by the Railroad, is still working for it under an individual contract of hiring between himself and the Railroad" (R., p. 86), but his contract, working rights, etc. are as made for him by the Collective Agreement.

What changes and modifications in the Trade Agreement prior to February 1941, made by Representatives under the Railway Labor Act affecting Petitioner's rate of pay, hours, working conditions, etc., and to all of which he was no doubt agreeable, have not been averred, and as there are no complaints to such previous modifications, it must be assumed they were satisfactory and advantageous to Petitioner.

In view of the world affairs since February 1941, and the unparalleled burdens placed on the railroads of this country since December 1941; Judge Creel very wisely foresaw, in the terms of the 1941 agreement, the probable and likely need for more engineers, and the necessary training to qualify men for such a responsible position, and the provision for supplying that need, and the necessity of qualifying firemen for promotions to meet the urgent demand which has been made upon the railroads of the South; and thus con-

strued in the light of subsequent happenings, this agreement has done its part in enabling the Railroads to make their greatest record of mileage, persons and property transported, and public service.

The universal and accepted custom and practice to not promote negro firemen to engineers being traditional and invariably practiced, was part of the contract of hiring, voluntarily made and entered into by Petitioner, and he is not now complaining that the February agreement denies him promotion to the position of engineer. Engineers are essential, and without them there can be no firemen, and in order for one to become an engineer, he must first be a fireman. It was a practical measure to provide a reasonable reserve of promotable firemen.

> "The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty."

*Mitau* v. *Roddan*, 149 Cal. 1, 84 Pac. 145, 150;
*City of Greenville* v. *Greenville Water Works*, 125 Ala. 625;
*Bixby-Theisen Company* v. *Evans*, 174 Ala. 571;
*Birmingham Water Works Co.* v. *Hernandez*, 196 Ala. 438.

**PETITIONER, WHETHER MEMBER OF BROTHERHOOD OR NOT, WAS SUBJECT TO THE AGREEMENT AND ITS PROVISIONS AS MADE AND CHANGED BY THE PARTIES THERETO.**

Petitioner's employment by the Railroad Company in 1941, and prior thereto, embodied the terms of the "Collective Bargaining Agreement between the Louisville & Nashville Railroad Company and its Locomotive Firemen and Hostlers issued March 1, 1929," which incorporated the following articles:

> "Article 32 (a). The right to make and interpret contracts, rules, rates and working conditions for locomotive firemen and hostlers is vested in the regularly constituted Committee of the Brotherhood of Locomotive Firemen and Enginemen and the General Officials of the Railroad."
>
> "Article 43. Duration of Agreement. The rates, rules and working conditions as provided herein shall be continued in effect subject to thirty days' written notice by either party."

This agreement of March 1, 1929, had been modified from time to time and Petitioner fails to allege and set out in substance or in *hace verba* the modifications, but under the averment of his Bill that modifications had been made from time to time it may be accepted that such modifications were made under and pursuant to the provisions of the agreement and by the giving of written notice as provided in Article 43, *supra*, and by the Railway Labor Act.

The Railroad no doubt in March 1910, made an individual contract of hiring of the Petitioner and there-

after, except as Petitioner a member of the class of firemen had the benefit of this agreement of March 1, 1929, and the Railway Labor Act, there was no individual written contract between the Railroad and the Petitioner covering his wages, rates of pay, time of employment and working conditions, and as we read the several averments of the Bill, Petitioner makes no contention that there existed any valid or written individual contract between the Petitioner and the Railroad with reference to his claimed seniority rights or job assignments, except as found in the Agreement of March 1, 1929. For enforcement of these rights the plaintiff in the first instance looks to the Agreement of March 1, 1929, and all modifications or changes made therein and, notwithstanding the alleged individuality of his hiring contract he continued in the service of the Railroad under the Collective Agreement of March 1929, and subject to all changes made therein.

> "The seniority rights acquired by her did not arise by virtue of her contract of employment with her employer, but existed by reason of the agreement of 1921 between the Railway and the Brotherhood. Ryan v. New York Cent. R. Co., 267 Mich. 202, 255 N. W. 365. This agreement was executed for the benefit of all the members of the Brotherhood, and not for the individual benefit of Plaintiff. When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to

create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members."

*Hartley* v. *Brotherhood of Ry. and SS. Clerks*, 277 N. W. 887.

## PETITIONER HAS NO STANDING EXCEPT FOR THE COLLECTIVE AGREEMENT.

At most the only individual transaction transpiring between the Petitioner and the Railroad, was the hiring of the Petitioner by the Railroad in 1910, and if this was all the Petitioner could rely upon, it would constitute nothing more than an indefinite hiring, which would constitute a hiring at will, and Petitioner would be wholly without the right, except for the Bargaining Agreement, to file this suit.

*Peacock* v. *Va. Carolina Chemical Co.*, 221 Ala. 682;

*Moore* v. *Ill. Cent. R. R. Co.*, 176 So. 569, 85 L. Ed. 1089, 312 U. S. 630.

And Petitioner being a Third Party Beneficiary of the Agreement, is bound by its terms.

"His rights depend upon, and are measured by, the terms of the contract. The right of a third person for whose benefit a promise is made is affected with all the infirmities of the contract as between the parties to the agreement. * * *.

"It has been said that before the beneficiary may accept the benefits of the contract, he must accept all of its implied, as well as express obligations. It has been said that if the beneficiary

accepts, he adopts the bad as well as the good, the burden as well as the benefit."

12 *Am. Jur.*, Sec. 289, p. 842.

"Of course, the right of the beneficiary of the contract is affected with all the infirmities of the agreement of the parties, and complainant, in attempting to enforce the same, is subject to all the equities arising out of the contract between the principal parties thereto. John F. Clark & Co. v. Nelson, 216 Ala. 199, 112 So. 819, 53 A. L. R. 173; Meyerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94, 55 A. L. R. 1231; 6 R. C. L. 886; 81 A. L. R. 1292."

*Franklin Fire Ins. Co.* v. *Howard,* 230 Ala. 668.

**ONE NOT A MEMBER OF A UNION, BUT A THIRD PARTY, IS UNDER THE AGREEMENT.**

Whether Petitioner was a member of the Brotherhood or not, he, as a member of the Craft or Class or a Third Party, is within the terms of the agreement, and therefore subject to all its provisions, including changes and modifications.

"But the case here before us involves, as would seem apparent, a still further step, and that is whether appellee who is not a member of the union which made the contract, but who has performed in accordance therewith, can rely upon and sue for its benefits; in other words, is he, as a third person, such a stranger to it that he can have no enforceable rights under it? That a third party may recover directly on a contract made expressly for his benefit is not an open question in this

State. Canada v. Yazoo & M. V. R. Co., 101 Miss. 274, 57 So. 913."

*Y. & M. V. R. Co.* v. *Sideboard,* 133 So. 671.

"When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed."

*Y. & M. V. R. Co.* v. *Webb,* 64 Fed. 2d 903-4.

**BROTHERHOOD IS PRINCIPAL TO AGREEMENT.**

The Brotherhood having been duly elected and certified as the Bargaining Agent of the Firemen thereby becomes the principal to the extent and in the respect that the Railroad cannot deal with each fireman as a principal, nor can it negotiate or conclude an agreement with any particular minority or majority group. Its dealings must be with the Bargaining Representative elected by the Craft or Class and no one else, and a Bargaining Representative is under no duty to take up with each of the employees it represents, matters which it is called upon to decide and agree upon in behalf of the Craft or Class.

*Article 32 (a), Agreement of March 1, 1929;*
*Steele* v. *L. & N. R. R. Co.,* 245 Ala. 133;
*Donovan* v. *Travers,* 285 Mass. 167, 188 N. E. 705;
*J. I. Case Co.* v. *National Labor Relations Board,* Vol. 88, L. Ed. Advance Op. p. 489;
*Brotherhood of Railway Trainmen* v. *Toledo, Peoria & W. R.,* Vol. 88, L. Ed. Ad. Op. p. 331;

*Brotherhood of Ry. & SS Clerks, etc.*, v. *United Transport Service Employees of America, et al.*, Vol. 88, L. Ed. 153, Vol. 88, L. Ed. 375;
*Order of Railroad Telegraphers* v. *Ry. Express Agency*, 88 L. Ed. Ad. Op. p. 495.

**MANDATORY FOR RAILROAD TO NEGOTIATE, AND IF PRACTICABLE, AGREE WITH BROTHERHOOD FOR ALL OF A CLASS.**

The Railway Labor Act, U. S. C. A. 45, Sections 151 *et seq.* includes within its terms Petitioner as an employee, and the term "representative" includes an employee organization, or labor union, designated by the Employees to act for them. The jurisdiction and power of the Employee Organization is *neither limited* nor *defined* by the Railway Labor Act or Orders of the Interstate Commerce Commission. Section 151, Subd. 5 and 6.

The general purposes of the Act in nowise limit or deny employees the right to join a Labor Organization, but provide for complete independence of the carriers and employees in the matter of self-organization. Section 151a.

The Act requires the carriers and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions; to settle all disputes, whether arising out of applications of such agreements or otherwise; in conferences between representatives designated and authorized by the carrier and employees to consider and decide, if possible, all disputes between Carrier and

its employees; that representatives for the purpose of the Act be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other, and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives; employees shall have the right to organize and bargain collectively through representatives of their choosing. The majority of any Craft or Class of employees shall have the right to determine who shall be the representative of the Craft or Class for the purpose of the Act; and it is not within the province of the carrier to in any wise question the right of its employees to join, organize or assist in organizing the labor organizations of their choice, and such acts are prohibited and are unlawful, Section 152 (4); the carrier cannot require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization, Section 152 (5); in case of disputes between a carrier and its employees arising out of a grievance or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, it shall be the duty of the representatives of the respective parties within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute and to specify a time and place at which such conference shall be held; and no carrier shall change the rates of pay, rules or working conditions of its employees as a Class, as embodied in agreements, except in the manner prescribed in such agreements or in Section 156

of this Title; and the willful failure of the carrier to comply with the terms of the 3d, 4th, 5th, 7th or 8th paragraphs of Section 152 shall be a misdemeanor for which the carrier and its officers are subject to fine and imprisonment.

> "Yet negotiation, in the sense of bargaining collectively, under the Railway Labor Act, is an obligation imposed by law."
>
> *Brotherhood of R. Trainmen* v. *Toledo, Peoria & W. R.*, Vol. 88, L. Ed. Ad. Op. 337.

The purposes, validity and constitutionality of which Act has been upheld by this and other Federal courts.

> "The duty of the minority to recognize the authority of representatives selected by the majority was as binding in this respect as the duty of the carrier to treat with the representatives so selected with respect to pay, rules, working conditions of employees, etc."
>
> *Atlantic Coast Line* v. *Pope*, 119 F. 2d 43.

And the Brotherhood was the true and only Representative of the Firemen.

> "Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employee and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by Sec. 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board,

when read in the light of the declared purposes of the Act, and of the provisions of Sec. 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, *is exclusive.* It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." (Emphasis ours.)

*Va. Ry. Co.* v. *System Fed., etc.*, 81 L. Ed. 800, 802;

*Steele* v. *L. & N. R. R. Co.*, 245 Ala. 133;

*Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705;

*J. I. Case Co.* v. *N. L. B.*, 88 L. Ed. Ad. Op. 489;

*Bro. of Ry. Trainmen* v. *Toledo, Peoria & W. R.*, Vol. 88, L. Ed. Ad. Op. 331;

*Bro. of Ry. & S. S. Clerks, etc.*, v. *United Transport Service Employees of America, et al.*, Vol. 88, L. Ed. 153, Vol. 88 L. Ed. 375.

And the employees' seniority rights arise by reason of the Collective Agreement, and not by any individual contract of hiring. Seniority is fixed by the Collective Agreement between the Representatives of the Carrier and of the Employees, and that Agreement is subject to change or modification both under its provisions and under the statute in the manner provided.

The Railway Labor Act in nowise suggests, fixes, directs or determines the terms of the Collective Agreement. It makes no provision in behalf of any employee, other than that such employee shall have the right to participate in the designation of the representative of the Craft or Class to which he belongs. The Act does

not inject itself into or side with majority or minority groups.

*Teague* v. *Bro. of Locomotive Firemen*, 127 F. 2d 56;

*Hartley* v. *Bro. of Ry. & S. S. Clerks*, 277 N. W. 887;

*Burton* v. *Ore. Wash. R. & Nav. Co.*, 38 Pac. 2d 73.

"The railroad company recognized the telegraphers' union, since it included a majority of all telegraphers employed, as being a representative organization having authority to speak for the members of such craft. The Railroad company believed in the principle of collective bargaining. It was impracticable to deal individually with its thousands of employees engaged in various kinds of work, so it determined on a policy of dealing with a representative organization which could speak with authority. Congress, at the time this schedule was adopted, had recognized the principle of collective bargaining in the enactment of the Railway Labor Act (Act. Cong. Feb. 28, 1920. Sec. 301, 41 Stat. 469, (45 U. S. C. A., Sec. 132) * * * Since the railroad company was dealing with its employees collectively as evidenced by the schedule itself, it will not do for the plaintiff, who accepted employment pursuant to the terms and conditions of the schedule to say that he is not bound by the construction which the employees as a group gave to it. When plaintiff entered the employment of the company, he was bound to accept the schedule as it came to him, to be read in the light of established *practice and interpretation.* There could not be an interpretation for one employee and a different interpretation for another

one. It applied to all employees alike. Any other conclusion would do violence to the purpose and spirit of collective bargaining agreements." (Emphasis ours.)

*Burton* v. *Ore. Was. R. & Nav. Co.*, 38 Pac. 2d 75.

Paragraphs 8 and 9 (R., pp. 86, 87), aver that the defendant Brotherhood member firemen ever since the passage of the Railway Labor Act have chosen the Brotherhood as the representative under that Act of the entire Craft or Class of firemen employed by Respondent Railroad, and that the Brotherhood has claimed the exclusive right to act, and has acted as the exclusive Bargaining Agency and Grievance Committee of the entire Craft or Class, and that by virtue of the minority of negro firemen, they have been compelled to accept the Brotherhood as the choice of the majority for their Statutory Representative under the Railway Labor Act for the purpose of the Act, and *"they did so accept the Brotherhood as the representative under the Railway Labor Act for the entire craft or class of firemen, including themselves,* and assuming that the Brotherhood would exercise its powers under the Railway Labor Act without fraud or discrimination against them, *they relied on it for protection of their rights in Collective Bargaining and handling of grievance with respondent Railroad"* (R., p. 87).

When a Class of employees have elected their Bargaining Representative, and it has been duly certified to the Railroad, the Railroad is not involved and should

not be made a party to any proceedings in equity which is primarily concerned with differences or contentions among the employees of a Class, nor a Labor Union Representative, and employees who are not members of that particular Union. The present suit, so far as the Railroad is concerned, is nothing more nor less than a controversy between the negro firemen and the Brotherhood without any right or authority in the Railroad to take sides or be a party to it. The Petitioner, by the foregoing quoted averments of his Bill, has admitted his acceptance of the Brotherhood as his Representative under the Railway Labor Act, and this being true, the Railroad should not be implicated in any controversial matter between the non-members and the members of the defendant Brotherhood, the Brotherhood being the declared and accepted Agency and Representative of both the defendant Brotherhood and negro firemen non-members of defendant Brotherhood. Therefore, the Railroad should be privileged to deal with the Brotherhood as the sole Bargaining Agency and Representative of both the white and negro firemen.

The Railroad did not voluntarily accede to the demands made on it by the Brotherhood in its official notice of March 28, 1940, for change of agreement provisions and did not voluntarily grant, and in fact, never did grant in full the demand and request of the Brotherhood, but the Railroad, as the provisions of the agreement were finally agreed to, must be considered as having declined to grant the request of the Brotherhood, and as having negotiated to an agree-

ment which was finally made, and which was much more favorable to the negro firemen, than were the terms of the agreement proposed by the Brotherhood.

Considering the demands in the notice and terms of the agreement finally consummated, the conclusion is inescapable that the Railroad, instead of conspiring and confederating with the Brotherhood to negotiate an agreement wrongful or injurious to Petitioner's position, resisted the proposals of the Brotherhood, and conferred and negotiated to a conclusion an agreement as favorable to the negro firemen as was possible for it to obtain from the Brotherhood; and the Court must consider that in finally acceding to the terms of the agreement as finally consummated, the Railroad was confronted with a situation where had it taken an arbitrary position and denied all the demands of the firemen *in toto,* it would probably have been faced with a strike and serious interference with interstate commerce.

The Brotherhood was, as stated, the Representative of all the firemen, and therefore, the Railroad was under duty to negotiate with it and, if possible, to reach an agreement on the demands presented.

## A CONTRACT MUST BE ACCEPTED OR REJECTED AS A WHOLE.

There are, no doubt, within the bounds of the agreement of March 1, 1929, many provisions beneficial to the Petitioner and which he has obtained through his Bargaining Representative. The position he now holds as a fireman and continues to work at is occupied by him by virtue of that agreement.

Thus enjoying the many beneficial provisions of the agreement negotiated and concluded in his behalf by his Bargaining Representative, and continuing daily to work under it, he cannot repudiate some provisions which he considers detrimental to his personal position.

> "Neither party to the contract will be allowed to affirm so much of the contract as is advantageous to him and enjoy all its benefits, and disaffirm and reject that which is burdensome" (30 Cyc., p. 354, subd. B and authorities cited).
>
> *Blackmon* v. *Quennelle*, 189 Alabama Reports, p. 633.

## NEITHER FRAUD NOR CONSPIRACY CHARGED AGAINST RAILROAD SUSTAINED BY AVERMENTS IN BILL.

The several and entire allegations of the bill of complaint fail to certainly charge the defendant, L. & N. R. R. Co., with any fraud or participation in any fraud or conspiracy to effect a fraud upon the plaintiff. Such facts as are alleged are entirely to the contrary.

"Without question general averments of fraud, in effect no more than the conclusions of the pleader, will not suffice when challenged by demurrer. The bill should aver facts disclosing in what the alleged fraud consists, advising the respondent what he is called upon to defend. Harris v. Nichols, 223 Ala. 58, 134 So. 798; Hyman, *et al.*, v. Langston, 210 Ala. 509, 98 So. 564."

*Williams* v. *Williams,* 238 Ala. 639.

"A fraudulent intent should be averred, and not left in inference, for the inference of the intent would be but the inference of one fact from another. Bliss v. Anderson, 31 Ala. 625, 70 Am. Dec. 511; Seale v. Robinson, 75 Ala. 363."

*Board of Rev. of Covington Co.* v. *Merrill,* 193 Ala. 547.

The L. & N. R. R. Co. is subject to the provisions of the Railway Labor Act and to heavy penalty for the violation of its provisions.

The Bill of Complaint in this cause does not charge the Railroad with violation of the Railway Labor Act, but had the Railroad undertaken to do the things which are implied and suggested by the Bill, it most certainly would have run counter to the Act and would have violated its duty to the Bargaining Representative of all of the firemen, and been subject to heavy penalties. Moreover, it would have precipitated such a state of confusion in its relation with its firemen as no doubt would have brought on strikes and interminable and prolonged strife and litigation with the Brotherhood

and its several members, all to the great detriment and inconvenience of the public.

In fact, the Railroad could not have made a legal agreement with the Petitioner or the negro firemen.

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the *carrier's efforts* to modify its terms through individual agreements are not effective. The award, therefore, was in accordance with the law." (Emphasis ours.)
>
> *Order of Railroad Telegraphers* v. *Railway Express Agency,* Vol. 88, p. 498, L. ed. Advance Op.

The Bill fails to charge the Railroad with any connection with, or participation in, or advanced promise of compliance with the demands of the Firemen, or any act or acts causing such demands to be made—nor is there the slightest intimation that the Railroad had hoped to or would benefit by the changes demanded or made. Under the averments of the Bill the negro firemen had always rendered efficient and loyal services and no services more beneficial or profitable to the Railroad were promised by the proposed changes.

*Steele* v. *L. & N. R. R. Co., supra.*

## NO FRAUD OR CONSPIRACY BY RAILROAD IN CHANGE OF AGREEMENT.

Paragraph 12 (R., p. 88) avers that on March 28, 1940, the Brotherhood, in fraud of rights of Petitioner, caused to be served upon the Railroad a Notice of its desire to amend existing Collective Bargaining Agreements covering the standard provisions in the individual hiring contracts of the individual firemen on the Railroad, aimed at driving the negro firemen completely out of the service of the Railroad, to the profit of its own members.

The Notice is set out as Exhibit "A," page 59 of Record, and the Amended Agreement and Interpretations at pages 10 to 21, inclusive.

It will be observed that this Notice advised the L. & N. R. R. Co. that *its employees* (emphasis ours) represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen had approved the presentation of a request to the Railroad for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, and asked the Railroad to accept it as the "Required Official Notice of our desire to revise the Agreement to the extent indicated" (R., p. 59), and in accordance with the terms of existing Agreement, and in conformity with the provisions of the Railway Labor Act.

This Notice was in form an authorized communication from the recognized Bargaining Agency and Representative of the Firemen as a Class or Craft, and

under both the then existing Agreement and Railway Labor Act an official and legal demand upon the Railroad requiring it to entertain, hear and negotiate on the several matters therein presented.

There is no allegation or charge in the Bill of Complaint that the Railroad had information or knowledge that the issuance of such a Notice had not been duly authorized nor that the Railroad had any part in its issuance or knowledge thereof until served. On the other hand, under the very wording of the Notice, its verity, authenticity and legality which the Railroad had no right or authority to question or to investigate informed the Railroad "that the Employees of the Railway *engaged in Service*" (emphasis ours) had approved the presentation of the request as embodied in the Notice.

This Notice was issued on March 28, 1940, but the agreement was not made until *February, 1941,* almost a year later. Therefore, ample time and opportunity were given to any and all firemen in the service to have interposed objections to the consummation of any agreement of compliance with provisions contained in Notice, or modifying the existing agreement so as to incorporate therein or substitute provisions in line with the Notice. We do not believe the Bill contains an averment that between the date of the issuance of this Notice, March 28, 1940, and the date of the agreement, February 18, 1941, the Petitioner or other firemen did not have knowledge or information which, if pursued, would have given them knowledge of the issuance of the Notice and its contents.

Since the Bill does not negative knowledge or information of the pendency of this Notice, it must be inferred that the Petitioner, and other firemen did, during the time it was outstanding between March, 1940, and February, 1941, have knowledge or information of the Notice in time to have made protests or objections thereto before February 21, 1941, eleven months after the Notice, but the Bill alleges no activities on the part of Petitioner or other firemen to prevent or obstruct the terms of the Notice becoming a part of the Agreement. The Railroad did not agree to revise the Agreement so as to incorporate therein the provisions of the Notice.

The Agreement made February 18, 1941, does not, by any means, adopt and incorporate into an agreement the provisions of the Notice. The terms of the Agreement, as amended and interpreted, are much more favorable to the Petitioner than were the changes demanded. Therefore, it must be conceded that the Railroad, in the first instance, did not accept and accede to the demands made upon it by the Brotherhood, and, second, that the Railroad negotiated an agreement more favorable to the Petitioner than the Brotherhood requested and advocated, and, third, the Railroad without even a protest from the Petitioner, and without help or assistance from the Petitioner, acted for and in behalf of the Petitioner and preserved for him certain rights which, but for the Railroad's acts in his behalf, he would have lost.

This Agreement (R., pp. 10 to 13) shows due execution by the parties, but it does not show the names

of the witnesses thereto. In fact, however, the Agreement was witnessed by George A. Cook, Chairman, and Otto H. Beyer, member of the National Mediation Board. See Railway Labor Act.

The Agreement and interpretation shown as Exhibit 11 (R., p. 13) were duly executed by Representatives of the L. & N. R. R. Co. and Brotherhood of Locomotive Firemen and Enginemen, pursuant to the provisions of the Railway Labor Act, and in accordance with the Agreement of March 1, 1929.

There is no allegation that the Agreements contravene any Federal or State law, and it is the opinion of the Railroad that they do not do so.

The Agreement, instead of prohibiting the employment of negroes as locomotive firemen, restricts the proportion of negro locomotive firemen and helpers to fifty percent; and eliminates the hiring of negro locomotive firemen and helpers until such proportion or percentage is established; and provides that until such percentage is reached on any seniority district, the filling of new runs or vacancies created as specified in the Agreement shall be by "promotable men," who, under present rules and practices, may not be negroes; and except as provided in Items (2) (a) and (2) (b) men now holding seniority as firemen or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

This is a far different agreement than proposed.

There is no allegation in the complaint that the Railroad has refused to employ negro locomotive firemen.

Locomotive firemen employed by the L. & N. R. R. Co. are represented by the Brotherhood of Locomotive Firemen and Enginemen, and the Bill contains no averment that the L. & N. R. R. Co. is informed or has any right or authority to be informed, or to know or have revealed to it, the provisions of the Constitution and By-laws of the defendant, Brotherhood. In fact, and it may be implied from the averments of the Bill, the Railroad is not informed of the provisions of the Constitution, By-laws or other regulations of the defendant, Brotherhood, or any rule of the Brotherhood which prohibits negro locomotive firemen from having a voice or part in the framing of proposals to be submitted to the Railroad, for agreement relating to wages, hours and working conditions.

> "It appears without dispute that the defendants have dealt with the representative of the Order in effecting the collectively bargained agreements, and they cannot be required to examine into the specific authority granted the representative of the Order."
>
> *Division 525, Order of Ry. Conductors of America* v. *Gorman,* 133 F. 2d. 278.

Under the averments of the Bill, Petitioner, at the time of making of the agreement, February 1941, was a fireman in road passenger service, and thereafter, on April 1, 1941, the jobs in said South End Passenger Pool were bulletined for bidding in "*because the firemen in the Pool had to be reduced after April 1, 1941, due to reduction in mileage*" (R., p. 92) (emphasis ours), and between the date of the making of the agree-

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ment in February 1941, and January 3, 1942, Petitioner was reassigned to the South End Passenger Pool and restored on such date to the position which he previously held before reduction in forces. Had the Railroad agreed to the demands of the Brotherhood in its Notice, Petitioner would not have been restored within such a short time, if ever, to his previous job, and Petitioner does not specifically aver to what extent he was affected by the *reduction of forces because of reduced mileage.*

Therefore, instead of the Railroad conspiring to damage or injure Petitioner in any rights, it very materially protected and preserved for him and his associates rights which, under the Notice, would have been taken from him.

> "(7) There must be some wrongful act performed that was necessary to, and concurring in, the proximate cause of the injury to the person suing, or of the damage for which the suit is brought. * * * The acts complained of, however, must be definitely and accurately stated, so that, if the facts themselves should be admitted the court can draw a legal conclusion therefrom—thus the illegal purpose or means, which the conspirators meant to accomplish or to resort to, must be described accurately, for unless the object is illegal, or the means agreed upon are illegal, there is no actionable wrong."
>
> *Nat'l Park Bank* v. *L. & N. R. R. Co.*, 199 Ala. 198, 199.

"The weight of authority is to the effect that a conspiracy to procure the breach of a contract,

without direct fraud, force, or coercion, is not actionable."

*McCluskey* v. *Steele*, 18 Ala. App. 33.

Instead of the Railroad entering into a combination or agreement with the Brotherhood to do Petitioner a wrong or injury, it opposed and resisted what the Brotherhood proposed to do by its Notice, and only did that which, no doubt it was forced to do, in the interest of the public welfare, and to avoid a possible strike.

It is respectfully submitted that the Writ of Certiorari was improvidently awarded, and the cause should be dismissed as to the Louisville & Nashville Railroad Company.

CHAS. H. EYSTER,
WHITE E. GIBSON,
*Attorneys for Louisville & Nashville Railroad Company.*

I, Chas. H. Eyster, do hereby certify that I am one of the attorneys of record for the Louisville & Nashville Railroad Company, Respondent in the above and foregoing entitled cause, and that I have this day mailed a copy of the foregoing Brief, postage prepaid to Chas. H. Houston, Esq., 615 F Street, N. W., Washington, D. C., and Arthur Shores, Esq., 1630 Fourth Ave. N., Birmingham, Alabama, Attorneys for Petitioner in the above and foregoing entitled cause.

This day of November, 1944.

CHAS. H. EYSTER,
*Attorney for Louisville & Nashville Railroad Company.*

# In the Supreme Court of the United States

**OCTOBER TERM, 1944.**

## No. 45.

BESTER WILLIAM STEELE,
*Petitioner,*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association, *et al.*

On Writ of Certiorari to the Supreme Court of the State of Alabama.

## BRIEF FOR RESPONDENTS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND W. H. THOMAS.


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# In the Supreme Court of the United States

**OCTOBER TERM, 1944.**

## No. 45.

BESTER WILLIAM STEELE,
*Petitioner,*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

## BRIEF FOR RESPONDENTS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND W. H. THOMAS.

*To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### OPINIONS BELOW:

(1) The decree of the Circuit Court of Jefferson County, Alabama, in Equity, rendered April 27, 1943, was not officially reported but appears in the record at page 124.

(2) The opinion of the Supreme Court of Alabama is reported as *Steele v. Louisville & Nashville Railroad Co., et al.*, 245 Ala. 113, 16 So. (2d) 416.

### JURISDICTION.

As these respondents understand, petitioner seeks review under Section 237 of the Judicial Code as amended by Act of February 13, 1935, 43 Stat. 939 (U. S. C. A. Title 28, Section 344).

## STATEMENT OF THE CASE.

The petitioner, as complainant, filed his bill of complaint (R. 84) in the Circuit Court of Jefferson County, Alabama, in Equity, against the Railroad, the Brotherhood and certain individual members of the Brotherhood. In this bill petitioner alleged that he was a negro fireman employed by the Louisville & Nashville Railroad and that he sued on behalf of himself and as representative of all other negro firemen and helpers employed by said Railroad.

The bill alleged that petitioner was fifty-five years of age, in good health and had been employed as a locomotive fireman for the Railroad since February 4, 1910, and had acquired certain seniority rights under a collective bargaining agreement between the Railroad and its locomotive firemen and hostlers, dated March 1, 1929 (R. 85-86); that white firemen constituted a majority of the craft or class on the Railroad as a whole, although on certain divisions the negro firemen constituted a majority (R. 86); that since the passage of the Railway Labor Act the Brotherhood, which admits only white men to membership therein, has acted as the bargaining representative of the entire craft; that the negro firemen have never been given an opportunity to participate in the choosing of such representative, but by reason of their minority position they were compelled to and did accept the Brotherhood as such representative under the Railway Labor Act (R. 87); that the Brotherhood thus assumed a confidential relationship with each fireman and undertook the performance of a fiduciary duty to represent them impartially and in good faith; that it therefore became the duty of such representative to give each fireman reasonable notice of any action proposed by such representative which might be adverse to his interest, with an opportunity to be heard and a chance to vote thereon; to make full disclosure of actions, not to discriminate between members of the class, and generally

to conform to the rules of law governing the relations existing between principal and agent (R. 87, 88).

After averring a general purpose and course of conduct alleged to be hostile and disloyal to petitioner and the minority group represented by him, in violation of the alleged duties of the Brotherhood as such representative, it is alleged that on March 28, 1940, in fraud of the petitioner and other negro firemen, without notice, hearing or vote, the Brotherhood, as such representative under the Railway Labor Act, served on the Railroad a notice or request for certain changes in the existing collective bargaining agreement of March 1, 1929 (R. 146), and asked for a conference for the consideration of such proposed changes. (R. 88,— for copy of notice of March 28, 1940, see R. 59 and 60.)

After negotiations pursuant to the notice dated March 28, 1940, it is alleged that the Brotherhood, as such representative under the Railway Labor Act, negotiated an amendatory agreement dated February 18, 1941 (R. 10, 11, 12 and 13), and on May 12, 1941, executed a supplemental agreement pursuant to the terms of the agreement of February 18, 1941 (R. 13 to 21).

It is alleged in the complaint that such changes or modifications adversely affected the seniority rights formerly enjoyed by the petitioner and other negro firemen under the agreement of March 1, 1929 (R. 146, *et seq.*).

The complaint sought relief as follows:

(1) To enjoin the enforcement of the alleged amendments of the basic agreement negotiated between the railroad and the Brotherhood for the benefit of the firemen as a craft under the Railway Labor Act (Chapter 8, Title 45, U. S. C. A.) (R. 96);

(2) For discovery from the railroad and Brotherhood of certain detailed information with respect to the earnings of firemen alleged to have received benefits under the amendment or modification of such agreement; and information with respect to the negotiations

by which the alleged amendment or modification was effected (R. 96);

(3) For an injunction against the Brotherhood, its officers and agents and against the individual respondents, enjoining them from acting for petitioner or others similarly situated, so long as such respondents refuse to give petitioner, or such others, notice and an opportunity to be heard and an opportunity to vote on proposals adversely affecting their interests, and so long as respondents discriminate against petitioner or those similarly situated (R. 96-97);

(4) For a declaratory judgment declaring the respective rights, status and other legal relations of the parties in, to and by reason of the matters in controversy (R. 97);

(5) For $50,000.00 damages claimed by petitioner against the Brotherhood for alleged injuries sustained by him as a consequence of the alleged wrongful acts of the Brotherhood in negotiating such amendment of modification to such employment agreement (R. 97);

(6) For damages against the Brotherhood for alleged injuries sustained by other firemen similarly situated, who may appear, submit to the jurisdiction of the Court and establish their claims for damages (R. 97).

Demurrers of the respondents to the complaint as last amended (referred to as "substituted amended complaint") were sustained, and the complaint was dismissed by a decree of the Circuit Court of Jefferson County, Alabama, in Equity, (R. 124, 125, 126), which decree was affirmed by the Supreme Court of Alabama (R. 131 to 144).

## SUMMARY OF ARGUMENT.

I. By statute in Alabama this suit may be maintained against the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, only if the action lies against all members of the Brotherhood individually. No statute or decision supports the theory that individual

members of an association, acting as a collective bargaining agent, are personally liable for the non-feasance, misfeasance or malfeasance of such bargaining agent. Petitioner's right to maintain the action under the Alabama statute was questioned by demurrer which was severally and separately sustained by the trial court and affirmed by the Supreme Court of Alabama. Disposition of this question, in addition to many others raised by the demurrer, does not involve the application of federal laws and therefore this Court, under its decisions, will not reverse the order dismissing the complaint.

II. Neither the complaint in this case (R. 83 to 98, inclusive) nor the interpretation thereof contained in the decision of the Supreme Court of Alabama (R. 131 to 144, inclusive) presents a case where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any statute of the United States, and hence the judgment of the Supreme Court of Alabama is not subject to review on certiorari by this Court.

III. The decision of the Supreme Court of Alabama sustaining the demurrer to the complaint here sought to be reviewed is grounded entirely and properly upon state law.

IV. Petitioner should exhaust his remedies under the administrative provisions of the Railway Labor Act before turning to the courts for relief through the injunctive process.

V. Supervision or review of the conduct of collective bargaining representatives is not a function of the courts.

VI. The relationship of a bargaining representative under the Railway Labor Act to a member of the class or craft bargained for is *sui generis* and cannot be subjected to the rules of law applicable to ordinary agencies or trusteeships.

## ARGUMENT.

### I.

**By statute in Alabama this suit may be maintained against the Brotherhood, an unincorporated association, only if the action lies against all members of the association individually. No statute or decision supports the theory that individual members of an association, acting as collective bargaining agent, are personally liable for the non-feasance, misfeasance or malfeasance of such bargaining agent.**

At the threshold of this case we are met with the problem presented by the foregoing statement. As will be developed in this section of the brief, petitioner's right to maintain the action against the Brotherhood was challenged by demurrer (R. 99). *The separate and several grounds of demurrer were sustained by the trial court* (R. 126). Upon appeal the Supreme Court of Alabama affirmed the decree appealed from in all respects (R. 144). The grounds for demurrer were many in number and, as noted, raised the question of petitioner's right to maintain the action under Section 143, Title 7, Code of Alabama, 1940. (See grounds numbered 4 (R. 99), 12, 13, 14, 15 and 16 (R. 100) and 17 and 18 (R. 101).) Disposition of this question (as well as others raised by the demurrer, to some of which we will hereafter allude) manifestly does not involve the application of federal laws and hence may be termed non-federal grounds for dismissal.

It is well established that before this Court can reverse the Supreme Court of Alabama it must find that all of the non-federal grounds upon which the decree of dismissal was based were so plainly unfounded that the dismissal may be regarded as arbitrary or a mere device to prevent review on the alleged federal question. *McCoy v. Shaw*, 277 U. S. 302; *Arkansas Southern R. R. Co. v. German Nat. Bank*, 207 U. S. 270; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468; *Great Northern R. Co. v. Leonidas*, 305 U. S. 1.

We will undertake in this section to demonstrate that the challenge of petitioner's right to maintain the action against the Brotherhood was well founded and that the decision of the courts of Alabama sustaining this ground of demurrer was not arbitrary.

Alabama adheres to the common law principle that in the absence of statutory authorization an unincorporated association is not a legally recognized entity and may not be named a party defendant to an action against the association as such. Prior to the enactment of Section 143, Title 7, Code of Alabama, 1940, it was thus impossible in Alabama to sue an association. *Brotherhood v. Green*, 206 Ala. 196, 89 So. 435. That section, reading as follows, conferred a limited right to sue according to its terms:

> "Actions or suits may be maintained against and in the name of any unincorporated organization or association for any cause of action for or upon which the plaintiff therein *may maintain such an action against the members of such organization or association.*" (Italics ours.)

The statute significantly does not authorize unincorporated associations to be sued in any and every kind of action. Only a limited authority is granted in this respect. Under the statute a suit may be maintained against the Brotherhood *only* if petitioner "may maintain such an action against the members of (the Brotherhood)." In view of the limited authorization of the Alabama statute with regard to the maintenance of actions against unincorporated associations, it would seem that petitioner's complaint must on its face establish that it is an action within the scope of the statute, that is, such an action as would lie against *all* of the members of the Brotherhood. Although Section 143 does not contain the word "all," we doubt that a serious argument can be made that it authorizes an action against an association in its name when less than all its members may be liable on the claims made

by a plaintiff. Our research has not revealed an opinion in point by Alabama courts. There is, however, a line of decisions in New York under a fairly comparable statute of that state providing thus:

> "An action * * * may be maintained against the president or treasurer of an unincorporated association, to recover any property, or upon any cause of action, for which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of * * * their liability therefor, either jointly or severally." (Title 18 A, McKinney's Consolidated Laws of New York, Sec. 13.)

The New York statute authorizes suits against an association by instituting action against the designated officer rather than against the association in its accepted name. For our purposes, this distinction from the Alabama statute is unimportant. The New York statute has the other distinguishing feature in that it expressly requires the ability to maintain the action against "*all* the associates." We submit that although the word "all" does not appear in the Alabama statute, the intendment of both statutes is identical, to-wit, that *all* the members must be liable upon the claim pleaded as a condition to maintenance of the suit. The New York courts have uniformly held that in an action instituted under their statute the petition must specifically allege facts establishing that all the members of the association are liable to the plaintiff on the cause of action alleged. *McCabe v. Goodfellow*, 133 N. Y. 89, 30 N. E. 728; *Schouten v. Alpine*, 215 N. Y. 225, 109 N. E. 244; *People v. Brotherhood of Painters, etc.*, 218 N. Y. 115, 112 N. E. 752 and *Empire City Job Print, Inc. v. Harbord*, 265 N. Y. S. 451, 148 Misc. 231. We submit that the application of the Alabama statute should be and was intended to be that made of the similar statute in New York.

Our next step is hence the determination of the question whether the complaint herein reveals an alleged cause

of action against all the members of the Brotherhood or merely a cause of action against certain officers and members, if there is any cause of action at all. The agreement of February 18, 1941, referred to by petitioner, is between the southeastern railroads and the chairmen of general grievance committees on those railroads. By its express terms (Section 5, R. 12), it was not automatically effective on the Louisville & Nashville Railroad, the reservation having been made that the Brotherhood's general grievance committee on that railroad might at its option retain the rules and conditions presently pertaining on the property. An "agreement in connection with application on the Louisville & Nashville Railroad" of the February 18, 1941, agreement was consummated between the Brotherhood's general chairman on the railroad and the director of personnel on May 12, 1941 (R. 13). The agreement was therefore localized to this railroad property in so far as these proceedings are concerned. There is obviously no relationship between the negotiation of this contract with the Louisville & Nashville Railroad and the vast majority of members of the Brotherhood, scattered as they are throughout the United States and Canada. The operation of the contracts attached to the complaint is limited to the Louisville & Nashville Railroad and those contracts have no application or effect on the large number of other railroads elsewhere in this country and Canada. At the very most, the contract of February 18, 1941, may be regarded as being operative with respect to firemen employed on the twenty-one southeastern railroads which are signatory to it. Under such conditions it is difficult to conceive of petitioner's having a cause of action for such violation of his seniority rights as may have been occasioned by the contract of February 18, 1941, against the members of the Brotherhood generally. Patently no cause of action against members not employed on the Louisville & Nashville Railroad could be

developed from the agreement of May 12, 1941, which manifestly has reference to that carrier only.

According to established rules, even members employed on the southeastern railroads would not be liable to petitioner. It is well settled that members of a voluntary association functioning as a labor union are not responsible for damages caused by unlawful acts of the association or its officers unless they personally authorized or participated in the particular acts. Such was the holding of this Court in *United States v. White*, .... U. S. ...., 64 S. Ct. 1248 (June 12, 1944), in which was discussed the liability of the individual members of Local No. 542, International Union of Operating Engineers. The following quotation from the opinion reveals the decision of the Court:

> "At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See *Lawlor v. Loewe*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341; *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 38 S. Ct. 80, 62 L. Ed. 286."

The complaint is devoid of allegations that any member of the Brotherhood of Locomotive Firemen and Enginemen authorized or participated in the acts set forth therein. Neither does the complaint contain any allegations differentiating the Brotherhood from the International Union of Operating Engineers as respects this problem.

A decision permitting the maintenance of the instant suit against the Brotherhood would require a holding that each individual member of this or any other unincorporated association, selected as bargaining agent under the Railway Labor Act, or under the National Labor Relations Act, must be liable in damages for any misfeasance or malfeasance on the part of the officers or governing

body of the organization. We submit that membership in an unincorporated association does not bestow upon the association's officers such powers of agency as would enable the officers to render the individual members liable for the officers' misfeasance. As the record herein shows at most, the bargaining agent acted through certain local officers only in relation to Brotherhood members in the southeastern section of the United States. It would be drastic indeed to hold that, while acting for a limited section of Brotherhood membership, the officers could make individual members of the association in the remotest parts of the United States and Canada personally liable and subject to a suit for damages. In consequence it clearly appears that the complaint does not contain an alleged cause of action in behalf of petitioner running against all of the members of the Brotherhood or any of them. The requirements that must exist as a condition to maintenance of suit against the Brotherhood under the statute are not present herein. Accordingly, the ground for demurrer was well taken.

Before concluding this section of the brief we pause to observe one other ground of demurrer, non-federal in nature, to-wit, the absence of indispensable parties to the case. As heretofore shown in the statement of facts, the complaint was brought against the Railroad, the Brotherhood of Locomotive Firemen and Enginemen and three individuals who occupy offices in local lodges and are in the employ of the Railroad as engineers and firemen (R. 83, 84). Among other relief, petitioner seeks an injunction against the enforcement of and the making of any claims under the agreement of February 18, 1941. It is apparent, from a study of the complaint and its prayer, that numerous firemen and engineers who have acquired claims to certain assignments by reason of the agreements sought to be set aside, have not been made parties to the complaint although their rights and interests are sought to be determined.

These individuals are essential parties to prosecution of the suit. *McMurray v. Brotherhood of Railroad Trainmen*, 50 F. 2d 968 (D. C., W. D. Penn., 1931). The decrees of the Alabama courts are supportable on this non-federal ground of demurrer alone and this Court will not decide whether the Alabama courts were correct in their holding in the particular respect.

Summarizing this portion of the brief we submit we have demonstrated:

1. That, where a state court decides a case on non-federal grounds, and those grounds are sufficient to sustain the judgment, the Supreme Court will not review the case even though it may consider the position of the state court to be unsound.

2. That, under the Alabama Code, this action may be maintained against the Brotherhood only if it is established in the complaint that all members of the Brotherhood are liable to petitioner on the cause of action alleged. In this connection we have shown that neither the membership generally, nor even the members employed on the southeastern railroads, are personally liable for the misfeasance or malfeasance of the collective bargaining agent. Hence the conditions required by statute to be shown in order to support a suit against the Brotherhood are lacking.

3. That persons whose rights and interests are sought to be determined are not before the Court, this lack of indispensable parties defendant having been brought to the attention of the Alabama courts by demurrer which was severally and separately sustained.

4. That, inasmuch as the decree of the Alabama courts may be supported on the two non-federal grounds mentioned above, among others herein noted in this brief, this Court will not, under its decisions, review the case.

## II.

**Neither the Complaint in this case (R. 83 to 98, inclusive) nor the interpretation thereof contained in the decision of the Supreme Court of Alabama (R. 131 to 145, inclusive) presents a case where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any statute of the United States, and hence the action of the Supreme Court of Alabama is not subject to review by certiorari by this Court.**

In the petition for writ of certiorari in this case, jurisdiction of this Court is invoked under "Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Section 347)." We do not understand this to be an apt citation, but assume that the petitioner invokes the power of this Court under Title 28, U. S. C. A., Section 344. (Certiorari to state courts of last resort.)

A classic statement on the often discussed question of when a case arises under the Constitution or laws of the United States is found in *Gully v. First National Bank*, 299 U. S. 109, by Mr. Justice Cardozo. In that case, it is said:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Authorities omitted.) The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. (Authorities omitted.) A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (authorities omitted), and the controversy must be disclosed upon the face of the complaint, unaided by the answer

or by the petition for removal. (Authorities omitted.) Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (Authorities omitted.)"

"* * * Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance. 'A suit to enforce a right which takes its origin in the laws of the United States, is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.' *Shulthis v. McDougal*, 225 U. S. 561, 569."

While the above case was one involving the right to remove a case from state to federal court, we are certain the fundamental test is the same where, as here, the cause of action must be shown to be one set up or claimed by either party under the Constitution or statutes of the United States.

In the petition for the writ of certiorari in this case, petitioner states: "The statute involved is the Railway Labor Act." No issue could be adjudicated by the Supreme Court of Alabama which was not tendered by the pleadings. Obviously, therefore, the complaint must be analyzed to determine whether a cause of action is set up under the Railway Labor Act as alleged in the petition for certiorari.

"The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of his own allegations."

*Hughes, Federal Practice Jurisdiction and Procedure*, Vol. 1, Section 543.

The allegations of the complaint show that petitioner is seeking to protect what he styles as his "seniority" rights and the "seniority" rights of others similarly situated. No other reason for the bringing of the suit is suggested.

The petitioner's seniority rights are based upon contract. In paragraph 4 of the complaint, he says:

> "He (petitioner) has been employed by the respondent railroad as a locomotive fireman since February 4, 1910 and has worked as such on the South and North Alabama Division since March 5, 1910, with seniority rights (Exhibit I below) from the latter date. He worked as a fireman in road passenger service on said Division from December 28, 1921, to February 8, 1941, when he was displaced by the wrongs of the railroad and the Brotherhood as set out below." (R. 85.)

In paragraph 5 of the complaint, he says:

> "Complainant was originally employed by the railroad and is still working for it under *an individual contract of hiring* between himself and the railroad. His contract has been modified from time to time by mutual agreement between plaintiff and the railroad, and presently embodies the terms of the collective bargaining 'Agreement Between The Louisville & Nashville Railroad And Its Locomotive Firemen and Hostlers' issued March 1, 1929 and incorporated in full herewith as Exhibit I attached hereto." (R. 86.) (Emphasis ours.)

(It is interesting to note that the agreement above referred to by petitioner as being the *contract* [R. 146 *et seq.*] on which is grounded his seniority rights, was a contract between this respondent Brotherhood and the carrier. For aught that appears to the contrary, the only seniority rights which petitioner has ever enjoyed since 1910 were those created by action of this Brotherhood, existing solely by reason of its contracts with the carrier, created by and subject to revision by its agency, both before and after the enactment of the Railway Labor Act.)

Again, in paragraph 15 of the complaint, petitioner describes the contract nature of the right here sought to be protected:

> "By virtue of the contracts which it had entered into with complainant and the other negro firemen, the railroad was under a duty to them to give preference of runs to the oldest fireman in road service when competent and worthy." (R. 89.)

And again, in paragraph 18 of the complaint, petitioner says:

> "In negotiating and executing said agreement and modification, the railroad, acting by and through its general officers who were then and there acting within the line and scope of their employment, did conspire and confederate with the Brotherhood to curtail the seniority rights and job assignments of complainant and the negro firemen in breach of existing *contracts* with the negro firemen, to the fraudulent advantage of the Brotherhood-member firemen." (R. 90.) (Emphasis ours.)

Succinctly stated, is it not accurate to say that the gravamen of this complaint is an alleged fraudulent interference with the contractual relation existing between petitioner and the railroad? The right which petitioner asserts is the right to have this contractual relationship remain undisturbed by the fraud or conspiracy of the Brotherhood and the railroad. If such a right exists now, it existed prior to the enactment of the Railway Labor Act and could have been then vindicated without reference to a federal statute, just as it can now be vindicated, if at all, without reference to a federal statute. Petitioner makes it manifest in his complaint that his rights are contractual and not statutory; he wholly fails to show, even by implication, that his right is one that will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another.

Petitioner cannot, of course, by a mere general reference to the Railway Labor Act, or by anticipating that the respondents will attempt to justify any alleged interference with his contract rights by the provisions of the Railway Labor Act, make this a case where "*any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any treaty or statute of* • • • *the United States.*" The full array of authorities on this question may be found collected in annotation to *Campbell v. Chase National Bank* (71 F. 2d 669), 94 A. L. R. 708, commencing on page 711.

By Section 27 of his complaint, the petitioner tardily and clearly without substantial effect attempted to raise the question of the applicability of the Fifth Amendment to the Constitution of the United States. This attempt was not followed up in the petition for certiorari, and we assume could not be effectually followed up or called a substantial insistence because the language of the Fifth Amendment does not purport to govern the acts of individuals or private persons.

By the references to race and color contained in the petitioner's complaint and his reference to the universal custom of American railroads of promoting only white persons to be engineers (R. 89), it seems to be the petitioner's purpose to make a general appeal for the intervention of federal courts because of petitioner's race. As was said by Mr. Justice Brewer in the case of *Hodges v. United States*, 203 U. S. 1, 19:

> "One thing more: at the close of the Civil War, when the problem of the emancipated slaves was before the nation, it might have left them in a condition of alienage, or established them as wards of the government like the Indian tribes, and thus retained for the nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the Fourteenth Amendment it made citizens of all born within the limits of the United States and subject to

its jurisdiction. By the Fifteenth it prohibited any state from denying the right of suffrage on account of race, color or previous condition of servitude, and by the Thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the states where they should make their homes.''

Recognizing that there is nothing in the Railway Labor Act on which he could base his right, the subject matter of this suit, the petitioner attempts to read into that Act provisions and effects which it does not contain and which were not given it by Congress. We refer to those portions of his complaint where he assumes that the Railway Labor Act requires the Brotherhood, acting as bargaining representative for the craft of firemen, to do certain acts of which there is no mention in the Railway Labor Act. For instance, in paragraph 11 of the complaint, he says:

> "It (the Brotherhood) has always refused and still refuses *to notify complainant* or the other negro firemen of proposed actions adversely affecting their interests, to give them a chance *to be heard or vote* on the same; has always refused and still refuses *to report* to them its actions as their statutory representative under the Railway Labor Act or to handle their just grievances wherever there is a conflict of interests between them and Brotherhood members, has persistently refused and still refuses to give them fair, honest and faithful representation under the Railway Labor Act." (R. 88.) (Emphasis ours.)

We submit that the Railway Labor Act wholly fails to require a bargaining representative to notify either

majority or minority members of the craft of proposed actions adversely affecting their interests or to give them a hearing or an opportunity to vote on the same or to report to them its actions. The petitioner cannot, by arbitrarily averring that the Railway Labor Act contains such requirements and then relying upon a breach thereof, thereby effectively *assert a right under a federal statute.* Such a statute does not exist. The mere averment that such a statute exists could not give the federal courts a jurisdiction which they would not possess in the absence of such unwarranted averment.

The general principles applicable to such averments may be found stated by this Court in the case of *Levering, etc. v. Morrin,* 289 U. S. 103, 105:

> "Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. (Citations.) And the federal question averred may be plainly unsubstantial either because obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'."

We respectfully submit that here involved is nothing more than petitioner's seniority rights based on contract, the protection of which is entirely within the ambit of the state's judicial power and entirely unaffected by any federal statute or Constitutional provision.

## III.

**The decision of the Supreme Court of Alabama sustaining the demurrer to the original complaint here sought to be reviewed is grounded entirely and properly upon state law.**

Let us consider each of the seven phases of the complaint as reflected in the seven prayers for specific relief.

**First**: An injunction of the nature sought cannot be awarded under Alabama law.

The primary purpose of the suit may fairly be said to be to obtain an injunction, thus described in *paragraphs 1 and 4* of the prayer of the complaint (R. 96 and 97):

> "1. He be granted a permanent injunction against each respondent and the persons they severally represent enjoining them and each of them from enforcing, making any claims under, or otherwise recognizing said Agreement and modification thereof.
>
> • • • • • •
>
> "4. A permanent injunction against respondent Brotherhood, its officers, subordinate lodges, members, agents, or attorneys, and the individual defendants perpetually enjoining them and each of them from purporting to act as representative of complainant or the other negro firemen on respondent railroad, under the Railroad Labor Act, so long as it or any of them refuses to give them notice, and an opportunity to be heard and to vote on proposals adversely affecting their interests, to make prompt and full disclosure of all actions taken by it or any of them affecting their interests in any way, and so long as it discriminated against any of them in favor of itself or any Brotherhood-member fireman."

If a writ of injunction, containing the mandates sought in these prayers, were awarded, the effect would be, insofar as *Prayer 1* is concerned, to put the parties back under the provisions of the agreement of March 1, 1929 (R. 146, *et seq.*). In effect, this would be an injunction in

aid of the specific performance or the making effective of the agreement of 1929. That agreement, under Alabama law, is not capable of being made the subject matter of a decree for specific performance. The petitioner does not, of course, seek to re-establish this contract and obtain specific performance thereof directly, but indirectly he does. Alabama courts will not award such relief. *Roquemore, etc. v. Mitchell,* 167 Ala. 475; 52 So. 423, 140 Am. St. 52 and Note.

The mandate sought in *paragraph 4* of the prayer would be completely incapable of enforcement. It would probably make necessary many hearings before the Court to determine whether or not the Brotherhood was "discriminating" against petitioner or those similarly situated and whether or not the Brotherhood had given sufficient "notice" to the petitioner and others similarly situated; the matter has no end so far as time for performance is concerned. A single decree of the Court could not be devised which would dispose of the matter. Alabama's courts have expressly declined to award injunctions of this kind.

> "The second decree above suggested would also be impracticable, not only for the reason that the court cannot compel the performance of the personal services assumed to be undertaken by the complainant, involving, as they do, the exercise of special skill, judgment and discretion, but it would be out of the question for the chancery court *to keep this case open for all time, or even for an indefinite term of years, to superintend the continuous performance of these duties by the complainant.* This might invite the frequent necessity on the part of the court of hearing complaints from the defendant charging the complainant with a breach of its duties, or from the complainant arraigning the defendant for contempt, for a violation of the injunction. There would thus be no end to the number of occasions *when the court might be called on from year to year to say whether the complainant has per-*

*formed the duties in question faithfully and efficiently,* so as to have kept the injunction in force; or negligently and unskillfully, so as to justify its breach. For these reasons the rule is that equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind, which the court cannot superintend." (Emphasis ours.) *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 So. 449.

**Second**: Alabama retains the distinction between suits at law and suits in equity.

Bona fide suits for discovery are, under the Alabama practice, equity suits, but where the prayer for discovery is merely a subterfuge for converting what otherwise would be an action at law into an action in equity, or is merely gratuitously thrown in to provide a basis for equitable jurisdiction, the Alabama courts prescribe rather strict standards. It must appear not only that the facts sought are known to the respondent and are unknown to the complainant and that they are unascertainable from any other source, but that they cannot be proved otherwise than by the use of a bill for discovery.

Alabama has very liberal rules for the use of interrogatories to the adversary party in suits both at law and in equity. These interrogatories must be answered within sixty days, affording ample discovery prior to trial. Alabama Code 1940, Title 7, Sections 477-486.

Alabama has very liberal statutes for use in suits at law and in equity requiring the production of documents and original instruments. Alabama Code 1940, Title 7, Sections 487-490. No litigant at law in Alabama is hampered by a lack of procedural remedies for securing any information whatever in the possession of his adversary relative to the issue.

The insertion of paragraphs 24 and 25 in the complaint (R. 94) and *paragraph 3* in the prayer (R. 96) was palpably for the purpose of offering an equitable subject matter,

if others failed, thus converting what otherwise would be a suit at law into a suit in equity. The Supreme Court of Alabama is authorized to decide whether or not these averments are sufficient. The rather rigid requirements of the Alabama rule have been briefly stated and the cases in support thereof cited in the case of *Cleveland Storage Co. v. Guardian Trust Co.*, 222 Ala. 210, 131 So. 634, where the following statement appears:

> "It is therefore no more than an effort to obtain a discovery in aid of a purely legal demand or claim. *In order to give equity to such a bill*, it is necessary to show that complainant does not know some of the facts essential to support an action at law, and/or has no legal means of ascertaining or proving them except by an answer of respondent; that is, in effect, that such facts are peculiarly known to respondent, and cannot be otherwise proven." (Emphasis ours.)

The information mentioned in paragraphs 24 and 25 of the complaint may not be within the knowledge of the petitioner but, like innumerable other facts, *can be proved* by the subpoenaing of the appropriate witnesses and can be ascertained in advance of trial, if desired, by propounding interrogatories and motions to produce records.

Since the draftsman of the complaint merely *mentions* the information he wishes in a discursive way, and does not frame the questions to which he desires answers, the Alabama court properly disregarded the averments. Clearly, these recitals were made, not to seek information, but to bolster jurisdiction. They are recitals, not questions.

**Third**: Can the case be held in equity because of the request for a declaratory judgment?

The petition for a declaratory judgment in Alabama must be brought in a law forum when it seeks to interpret legal rights and in an equity forum when it seeks to determine equitable rights.

The Alabama Supreme Court, after analyzing Alabama's Declaratory Judgment Act, said:

> "But we do not construe this language to mean that the Declaratory Judgment Act had the effect to obliterate the distinction between proceedings in equity and actions at law in giving coercive relief." *Berman v. Wreck-A-Pair Co.*, 236 Ala. 301, 182 So. 54.

The court, in the same case, quoted the first section of the Declaratory Judgment Act as it appears in the Code of 1940 (Title 7, Section 156) and italicized certain words therein as shown below:

> "Courts of record *within their respective jurisdictions* shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

The rights sought to be vindicated in this suit, as elsewhere in this brief argued, are legal rights. Wrongful interference with contractual rights is the gist of the suit. The Alabama court has clearly said that the case will not be converted into an equitable proceeding by claiming a declaration of legal rights under the 1935 statute.

In addition to the case just quoted from, two other like holdings appear in recent decisions of Alabama's Supreme Court:

> *Tuscaloosa Co. v. Shamblin*, 233 Ala. 6, 169 So. 234;
> *Teal v. Mixon*, 233 Ala. 23, 169 So. 477.

**Fourth**: The claim for damages, *paragraphs 6 and 7* of prayer (R. 97), is the main relief prayed, and a suit for damages cannot be maintained in equity in Alabama and a jury trial denied unless on the theory of affording complete

relief in a matter in which equity has jurisdiction on some other ground.

Suits for damages for unlawful invasion of contract rights, as suits for damages for any other cause, must be brought in the law courts of Alabama. Illustrative of this are the following:

*Shaup v. Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 337;

*U. S. Fidelity, etc. Co. v. Millonas*, 206 Ala. 147, 89 So. 732; 29 A. L. R. 520.

We have adverted to each of the seven prayers for specific relief found in the complaint.

In conclusion, therefore, we submit that there is no issue tendered by the complaint, as reflected in either prayer for relief, on which relief can be granted by an Alabama court of equity, such as that in which this proceeding was instituted. The Supreme Court of Alabama, applying its own decisions and precedents, affirmed the lower court, which sustained the demurrer to the complaint. It could not have done otherwise. No federal statutory or Constitutional issue was involved in these considerations.

There is, therefore, no occasion for the Supreme Court of the United States to review this decision. If this Court should send this case back to the Supreme Court of Alabama, it could instruct that Court to overrule the demurrer to the complaint only by overriding the clearly enunciated domestic precedents of that Court.

## IV.

**Petitioner should exhaust his remedies under the administrative provisions of the Railway Labor Act before resorting to the courts for relief through the injunctive process.**

For the purpose of discussing this proposition, we will assume, arguendo, that the Railway Labor Act is subject to the construction that a bargaining representative must give notice to craft members of proposed actions, permit an opportunity on their part to express their views by voting and report bargaining results, all as repeatedly alleged in the complaint. Even under this assumption, however, petitioner is immediately confronted with the question of how these rights allegedly created by the Railway Labor Act may be enforced.

Petitioner states his case thus:

> "Petitioner is * * * seeking * * * protection of his rights as fireman and he declines to permit the issue to be turned from the point." (Brief supporting petition for certiorari, page 15.)

May he seek that protection in the form of an injunction at the hands of the courts?

In his complaint—paragraph 23—(R. 98), petitioner says that he and "the negro firemen have exhausted their remedies within the structure of the railroad and the Brotherhood," but he fails to say that he has exhausted his remedies or even sought relief under the administrative machinery of the Railway Labor Act or that such an attempt would be in vain, and he fails to aver that his "right" is one which Congress has brought forward from the realm of conciliation, mediation and arbitration into the realm either of administrative or judicial remedy.

What is the remedy which he seeks here to assert? Isn't it fair to say that it is the right to have reviewed by a judicial body the quality of representation accorded him

by his bargaining representative? He asserts that this representation is faithless and fraudulent. To determine that charge some court must say that the representative did not conclude for him a bargain representing what, in good faith, seemed a proper resolution of the clashing interests of each group of firemen, white and colored, the carriers and the public.

The complaint says—paragraph 13:

> "According to existing railroad practice in the United States, locomotive engineers are obtained by promotion of selected white locomotive firemen. By traditional and universal railroad practice in the United States negro firemen arbitrarily are never promoted to engineers. * * *." (R. 89.)

Petitioner's seniority rights originated through bargaining procedures of this Brotherhood and were for many years dependent entirely upon its efforts and contracts; as legislation entered the field in 1920, in 1926 and 1934 it has never been questioned that seniority rights still could be changed, altered or adjusted by collective bargaining contracts between the craft and the carrier.

Is the petitioner entitled to have the collective bargaining contracts of February 18, 1941, and March 15, 1941, judicially investigated by a court and adjudicated as to their wisdom, their good faith and fair dealing under all influencing factors?

Is he entitled to an injunction against the Brotherhood, its officers, etc.:

> "* * * perpetually enjoining them and each of them from purporting to act as representatives of complainant or the other negro firemen on respondent railroad under the Railway Labor Act, *so long as it or any of them refuses to give them notice and an opportunity to be heard and to vote on proposals adversely affecting their interests, to make prompt and full disclosure of all actions taken by it or any of them affecting their interests in any way,* and so long as it discriminated

against any of them in favor of itself or any Brotherhood-member fireman."—*paragraph 4* of prayer of complaint. (R. 96 and 97.) (Italics ours.)

Must a court of equity of Alabama by injunctive process seat itself as a permanent monitor over the conduct of a bargaining representative, empowered by the Railway Labor Act?

In paragraphs 20 to 23, inclusive, of the complaint, petitioner sets forth in specific terms a private complaint or, in labor terms, a typical "grievance," on account of being displaced by a fireman junior in service to himself.

The petitioner's complaint—paragraph 26—(R. 95) alleges:

> "An actual claim or controversy exists between complainant and the negro firemen as a class on one side and the railroad, the Brotherhood and the Brotherhood-member firemen on the other * * *."

In paragraph 2 of the complaint (R. 84), petitioner recites that:

"He brings this suit:

> "(1) in his individual capacity for wrongs inflicted on his individual rights, and
>
> "(2) as representative of all the negro firemen * * * employed by respondent railroad."

If this controversy is viewed as a grievance on the part of *petitioner or the group of employees* for whom petitioner assumes to sue, then it would seem the Railway Labor Act (Title 45 U. S. C. A., Section 153 First [i]) affords an ample forum (National Railroad Adjustment Board) with enforceable decisions (Sec. 153, First [p]).

The statute reads:

> "The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances* or out of the interpretation or application of agreements concerning rates of pay, rules, or work-

ing conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Italics ours.)

If the controversy, on the other hand, be viewed as a demand by the *negro firemen as a class* for recognition as a separate "class" for bargaining purposes then it would seem the Railway Labor Act (Title 45, U. S. C. A., Sec. 152, Ninth) affords an ample forum (National Mediation Board) to right any wrong with respect to representation. This Board could determine the propriety of the "class" sought to be set up—determine who could vote therein, etc.

This section reads in part:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * * In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days desig-

nate the employees who may participate in the election. * * *"

In the light of these two provisions of the Railway Labor Act, one wonders why a litigant, actually and in reality seeking relief, would exhaust his remedies "within the structure of the railroad and the Brotherhood" and would not turn to these obvious avenues through which to obtain redress.

As we understand the recent decisions of this Court, the question here raised is not justiciable in character and certainly cannot be made the subject matter of a suit for an injunction. If the particular "right" sought to be vindicated has a forum other than "conciliation, mediation and arbitration," it is provided in the sections of the Railway Labor Act above quoted. *Brotherhood of Railroad Trainmen, etc. v. Toledo, P. & W. R. R.*, 321 U. S. 50.

In the last cited case, a carrier subject to the Railway Labor Act sought to secure an injunction against violence to its properties and interference with interstate commerce during a strike and made out such an appealing case that the lower court awarded the writ and the Circuit Court of Appeals affirmed (132 F. 2d 265).

This Court denied the relief, however, and turned the carrier away because it had not submitted to voluntary arbitration, one of the means for averting strife provided by the Railway Labor Act. It had embraced mediation and conciliation but had refused arbitration and thereby forfeited its right to resort to the courts for an injunction.

For the entire Court, Mr. Justice Rutledge said in the *T. P. & W.* case:

> "The policy of the Railway Labor Act was to encourage use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes. * * * The over-all policy of the Norris-LaGuardia Act was the same. The latter did not entirely abolish judicial power to impose previous restraint in

labor controversies. But its prime purpose was to restrict the federal equity power in such matters within greatly narrower limits than it had come to occupy. It sought to make injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting. This purpose runs throughout the Act's provisions. It is dominant and explicit in Section 8. In short, the intent evidenced both by words and by policy was to gear the section's requirements squarely into the methods and procedures prescribed by the Railway Labor Act."

If the *carrier* must first resort to all of the remedial and curative provisions of the Railway Labor Act, before resorting to injunctive process, should not the petitioner, who says he is proceeding under the same Act? We are not unmindful of this Court's expression on the right to resort to court found in *Moore v. Illinois Central R. R. Co.*, 312 U. S. 630. Mr. Justice Black was there speaking of the right to resort to courts to enforce a legal right, not to obtain the equitable and to some extent discretionary remedy of injunction as here sought, to interfere with the normal processes of collective bargaining. The injunction here sought would be a clear use of that judicial remedy in a "labor controversy" as that term seems to be used in *Brotherhood of Railroad Trainmen v. Toledo, etc., supra.*

## V.

**Supervision or review of the conduct of collective bargaining representatives acting under the Railway Labor Act is not a function of the courts.**

We submit that the courts ought not to be called upon to adjudicate the questions raised in petitioner's complaint, just as this Court held they should not be called upon to adjudicate the series of questions raised in the group of three cases decided November 22, 1943, as follows:

*General Committee of Adjustment of the Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas Railroad v. Missouri-Kansas-Texas Railroad Co., et al.*, 320 U. S. 323;

*General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Co. v. Southern Pacific Co., et al.*, 320 U. S. 338;

*Switchmen's Union of North America, et al., v. National Mediation Board, et al.*, 320 U. S. 297.

In the first of these cases, the firemen's organization and the engineers' organization engaged in a controversy concerning representation of certain employees of the carrier, and this Court, almost as if speaking of the case at bar, in its opinion, said:

"But, it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by § 5, First, Congress provided that either party to a dispute might invoke the services of the Mediation Board in a 'dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference' and any other 'dispute not referable' to the Adjustment Board and 'not adjusted in conference between the parties or where conferences are refused.' Beyond the mediation machinery furnished by the Board lies arbitration. § 5, First and Third, § 7. In case both fail there is the Emergency Board which may be established by the President under § 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress

utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (320 U. S. 332.)

In another of this group of cases, *General Committee, etc. v. Southern Pacific Co., supra,* this Court again declined to recognize as a justiciable issue a controversy raging between groups of employees subject to the Railway Labor Act. The prevailing opinion characterized the dispute as a jurisdictional one. It was, nevertheless, a case in which this Court turned back from that great mass of litigation which would result if dissatisfied individuals or dissatisfied minorities could take their contentions to the judicial forum. The Court, in refusing judicial process for the settlement of controversies of this kind, said:

"• • • From these various materials, each seeks to prove that Congress has fashioned a federal rule (enforcible in the courts) concerning the authority of collective bargaining agents to represent various classes of employees on their individual grievances. All of these would be relevant data for construction of the Act if the courts had been entrusted with the task of resolving this type of controversy. But we do not think they were." (320 U. S. 342.)

In the last of this group of cases, known as the "Switchmen's Union case," the Court has very clearly and definitely delineated the field of judicial review in controversies under the Railway Labor Act. Here the Court has said:

"As is indicated at some length in *General Committee of Adjustment. v. Missouri-Kansas-Texas R.*

*Co., post,* p. 323, the emergence of railway labor problems from the field of conciliation and mediation into that of legally enforcible rights has been quite recent. Until the 1926 Act the legal sanctions of the various acts had been few. The emphasis of the legislation had been on conciliation and mediation; the sanctions were publicity and public opinion. Since 1926 there has been an increasing number of legally enforcible commands incorporated into the Act. And Congress has utilized administrative machinery more freely in the settlement of disputes. But large areas of the field still remain in the realm of conciliation, mediation, and arbitration. On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the *Missouri-Kansas-Texas R. Co.* case beyond our conclusion that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (320 U. S. 301, 302.)

This Court has very clearly said the hands of the courts should not be laid on the machinery for settling disputes set up by the Railway Labor Act:

> "For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature." *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630, at 635.

And petitioner says, notwithstanding the above expressions of this Court, that the *Railway Labor Act* is the statute under which he brings this suit.

## VI.

**The relationship of a bargaining representative under the Railway Labor Act to a member of the class or craft bargained for is sui generis and cannot be subjected to the rules of law applicable to ordinary agencies or trusteeships.**

The complaint, apparently to meet the decision in *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir., 127 F. 2d 53, which may be fairly called a companion case to this, proceeds on the theory that the respondent Brotherhood, upon being designated petitioner's bargaining representative, became petitioner's agent, under the obligation to exercise the very high degree of good faith imposed upon ordinary fiduciaries. It proceeds upon the theory, judging by the Alabama authorities cited in his brief in support of the petition for a writ of certiorari, that the negotiation of the 1941 amendments to the 1929 contract between the Railroad Company and the craft of firemen may, in effect, be tested by that very high standard prevailing between trustee and *cestui que trust* and in similar relationships, and if it falls short of this standard it is, in effect, a fraud by the Brotherhood upon the rights of petitioner.

The three companion cases decided by this Court on November 22, 1943, heretofore cited, seem to recognize the fact that the Railway Labor Act has given rise to a set of relationships somewhat new to the law and only in limited measure capable of juridical treatment and then only in those cases expressly declared so to be by Congress.

The complexity of affairs which would arise if the laws of agency were applicable to the relationship between petitioner and respondent Brotherhood in the sense that the laws of agency are applicable in the Alabama cases cited by petitioner, viz: *Brasher v. First National Bank*, 232 Ala. 340, 168 So. 42; *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71, would, by its mere statement, prevent any

responsible person or organization from accepting the duty of bargaining agent.

If every dissatisfied member or group of members of the craft being bargained for could maintain an action in a state court for breach of duty as against a fiduciary, results would follow which were entirely unanticipated when Congress passed the Railway Labor Act and the National Labor Relations Act.

1. Every collective bargaining agreement would be subject to review by a court and jury in a damage suit by a disgruntled member of the craft affected, claiming that his rights were sacrificed unjustly to the interests of others.

2. It would give rise to a situation where only financially irresponsible organizations would accept designations as bargaining agents.

3. It would involve a most extensive investigation to determine whether the contract complained of was in fact legally harmful to complainant's interests, which inquiry would involve the negotiations leading up to it, the economic pressures involved, the public policy involved, and the element of human judgment involved. This would constitute a judicial review of collective bargaining, something so far unknown. Even administrative review of collective bargaining is so far unknown.

4. To hold that the rights arising under collective bargaining relationships can be made the subject matter of suits for damages such as this would intimidate bargaining representatives in the discharge of their duties, and introduce an entirely new element into consideration in their activities.

5. It would be a legal anomaly to allow a state court to enjoin a bargaining agency from representing a craft if such state court were of the opinion that the agent was acting in bad faith, in view of the drastic curtailment of

the injunctive process by the Norris-LaGuardia Act. Interminable delay in carrying out collective bargaining contemplated by the Railway Labor Act and the National Labor Relations Act would result.

6. The respondent Brotherhood has, in fact, been a collective bargaining agency for firemen on this Railroad for many years, both before and after the passage of the Railway Labor Act. Before the passage of the Act, the petitioner would have had no cause of action against the Brotherhood for the matters now complained of. The Act itself gives rise to no such causes of action by any provision cited therein. It is, therefore, reasonable to assume that the Court's statement in the three companion cases decided November 22, 1943, on this subject, that certain relationships are not subject to judicial consideration, applies to the cause of action here attempted to be set up.

7. It should not be forgotten that individuals or minority groups dissatisfied with the result of collective bargaining conducted for their craft by representatives elected by the majority have the right to avail themselves of the grievance machinery provided by the Railway Labor Act.

8. The Railway Labor Act was not passed to regulate working conditions, but only to prevent disputes. Its program for preventing disputes was to give effect to the will of the majority in a craft. This policy necessarily sometimes involves the overriding of the views of the minority.

9. The provision guaranteeing an open shop contained in the Railway Labor Act indicates that Congress contemplated that the bargaining representative would, in all probability, be acting for persons other than members of a union which might have been designated as bargaining agent.

The most recent case decided by this Court touching this question is *Brotherhood of Railway and Steamship*

*Clerks, etc. v. United Transport Service Employees, etc.*, 320 U. S. 715. This case was decided without an exposition of the Court's views but with a reference to the three cases decided November 22, 1943. The facts of the case (137 F. 2d 817) are almost identical with the facts recited in the complaint at bar.

We respectfully urge that if the minority group of negro "red caps" were not entitled to take their grievances to court in the case above cited, there is no stronger reason for the minority in this case to call on a court to supervise, either by damage suit, injunctive process or otherwise, the functioning of this bargaining representative. Fundamentally, the position of the negro "red caps" and that of the petitioner herein is the same. We venture to suggest to the Court that to apply the rules of agency as recognized at common law to the relationship between the spokesmen for the Brotherhood and the 90,000 members of the Brotherhood with respect to the conduct of a collective bargaining conference with a carrier is impractical and impossible. No method of consultations or instructions exists.

A closer analogy is that of a representative under a republican form of government. The bargaining representative is, in a sense, elected or chosen like a representative in the government and, no doubt, could be removed in the case of fraud, but certainly members of the organization generally would not be responsible for the unfaithful conduct of the person or persons who might be chargeable with any fraudulent conduct. There is no more justiciability involved in a suit by the members of a craft against their bargaining representative than would be the case of citizens against a representative in the government. In effect, the representative accepts office, and the legal relationship of principal and agent does not exist.

## CONCLUSION.

For the reasons stated herein, we submit that the decree dismissing the complaint should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 45.—October Term, 1944.

Bester William Steele, Petitioner,
*vs.*
Louisville & Nashville Railroad Company, Brotherhood of Locomotive Firemen and Enginemen, et al.

On Writ of Certiorari to the Supreme Court of the State of Alabama.

[December 18, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. §§ 151 *et seq.*, imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.

The issue is raised by demurrer to the substituted amended bill of complaint filed by petitioner, a locomotive fireman, in a suit brought in the Alabama Circuit Court against his employer, the Louisville & Nashville Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor organization, and certain individuals representing the Brotherhood. The Circuit Court sustained the demurrer, and the Supreme Court of Alabama affirmed. 245 Ala. 113, 16 So. 2d 416. We granted certiorari, 322 U. S. 722, the question presented being one of importance in the administration of the Railway Labor Act.

The allegations of the bill of complaint, so far as now material, are as follows: Petitioner, a Negro, is a locomotive fireman in the employ of respondent railroad, suing on his own behalf and that of his fellow employees who, like petitioner, are Negro firemen employed by the Railroad. Respondent Brotherhood, a labor organization, is, as provided under § 2, Fourth of the Railway Labor Act, the exclusive bargaining representative of the craft of firemen employed by the Railroad and is recognized as such by it and the

members of the craft. The majority of the firemen employed by the Railroad are white and are members of the Brotherhood, but a substantial minority are Negroes who, by the constitution and ritual of the Brotherhood, are excluded from its membership. As the membership of the Brotherhood constitutes a majority of all firemen employed on respondent Railroad, and as under § 2, Fourth the members because they are the majority have the right to choose and have chosen the Brotherhood to represent the craft, petitioner and other Negro firemen on the road have been required to accept the Brotherhood as their representative for the purposes of the Act.

On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of firemen, without informing the Negro firemen or giving them opportunity to be heard, served a notice on respondent Railroad and on twenty other railroads operating principally in the southeastern part of the United States. The notice announced the Brotherhood's desire to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the service. By established practice on the several railroads so notified only white firemen can be promoted to serve as engineers, and the notice proposed that only "promotable", i. e. white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs.

On February 18, 1941, the railroads and the Brotherhood, as representative of the craft, entered into a new agreement which provided that not more than 50% of the firemen in each class of service in each seniority district of a carrier should be Negroes; that until such percentage should be reached all new runs and all vacancies should be filled by white men; and that the agreement did not sanction the employment of Negroes in any seniority district in which they were not working. The agreement reserved the right of the Brotherhood to negotiate for further restrictions on the employment of Negro firemen on the individual railroads. On May 12, 1941, the Brotherhood entered into a supplemental agreement with respondent Railroad further controlling the seniority rights of Negro firemen and restricting their employment. The Negro firemen were not given notice or opportunity to be heard with respect to either of these agreements, which were put into effect before their existence was disclosed to the Negro firemen.

Until April 8, 1941, petitioner was in a "passenger pool", to which one white and five Negro firemen were assigned. These jobs were highly desirable in point of wages, hours and other considerations. Petitioner had performed and was performing his work satisfactorily. Following a reduction in the mileage covered by the pool, all jobs in the pool were, about April 1, 1941, declared vacant. The Brotherhood and the Railroad, acting under the agreement, disqualified all the Negro firemen and replaced them with four white men, members of the Brotherhood, all junior in seniority to petitioner and no more competent or worthy. As a consequence petitioner was deprived of employment for sixteen days and then was assigned to more arduous, longer, and less remunerative work in local freight service. In conformity to the agreement, he was later replaced by a Brotherhood member junior to him, and assigned work on a switch engine, which was still harder and less remunerative, until January 3, 1942. On that date, after the bill of complaint in the present suit had been filed, he was reassigned to passenger service.

Protests and appeals of petitioner and his fellow Negro firemen, addressed to the Railroad and the Brotherhood, in an effort to secure relief and redress, have been ignored. Respondents have expressed their intention to enforce the agreement of February 18, 1941 and its subsequent modifications. The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the firemen's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the Act to represent the Negro firemen impartially and in good faith; but instead, in its advice to and contracts with the railroads, it has been hostile and disloyal to the Negro firemen, has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of employment in their craft, all in order to create a monopoly of employment for Brotherhood members.

The bill of complaint asks for discovery of the manner in which the agreements have been applied and in other respects; for an injunction against enforcement of the agreements made between the Railroad and the Brotherhood; for an injunction against the Brotherhood and its agents from purporting to act as representative of petitioner and others similarly situated under the Railway Labor Act, so long as the discrimination continues, and so long as

it refuses to give them notice and hearing with respect to proposals affecting their interests; for a declaratory judgment as to their rights; and for an award of damages against the Brotherhood for its wrongful conduct.

The Supreme Court of Alabama took jurisdiction of the cause but held on the merits that petitioner's complaint stated no cause of action.[1] It pointed out that the Act places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft, imposes heavy criminal penalties for willful failure to comply with its command, and provides that the majority of any craft shall have the right to determine who shall be the representative of the class for collective bargaining with the employer, see *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 545. It thought that the Brotherhood was empowered by the statute to enter into the agreement of February 18, 1941, and that by virtue of the statute the Brotherhood has power by agreement with the Railroad both to create the seniority rights of petitioner and his fellow Negro employees and to destroy them. It construed the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them.

If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitu-

[1] The respondents urge that the Circuit Court sustained their demurrers on the ground that the suit could not be maintained against the Brotherhood, an unincorporated association, since by Alabama statute such an association cannot be sued unless the action lies against all its members individually, and on several other state-law grounds. They argue accordingly that the judgment of affirmance of the state Supreme Court may be rested on an adequate non-federal ground. As that court specifically rested its decision on the sole ground that the Railway Labor Act places no duty upon the Brotherhood to protect petitioner and other Negro firemen from the alleged discriminatory treatment, the judgment rests wholly on a federal ground, to which we confine our review. Grayson v. Harris, 267 U. S. 352, 358; International Steel Co. v. National Surety Co., 297 U. S. 657, 666; Indiana *ex rel.* Anderson v. Brand, 303 U. S. 95, 98, 99 and cases cited.

tional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act. Section 2, Fourth provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act . . . .". Under §§ 2, Sixth and Seventh, when the representative bargains for a change of working conditions, the latter section specifies that they are the working conditions of employees "as a class". Section 1, Sixth of the Act defines "representative" as meaning "Any person or . . . labor union . . . designated either by a carrier or a group of carriers or by its or their employees to act for it or them". The use of the word "representative", as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.

By the terms of the Act, § 2, Fourth, the employees are permitted to act "through" their representative, and it represents them "for the purposes of" the Act. Sections 2, Third, Fourth, Ninth. The purposes of the Act declared by § 2 are the avoidance of "any

interruption to commerce or to the operation of any carrier engaged therein," and this aim is sought to be achieved by encouraging "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." Compare *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 569. These purposes would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid.

Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. *Virginian Railway Co.* v. *System Federation, supra*, 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, and see under the like provisions of the National Labor Relations Act *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, and *Medo Photo Supply Corp.* v. *Labor Board*, 321 U. S. 678.

The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them. As we have pointed out with respect to the like provision of the National Labor Relations Act in *J. I. Case Co.* v. *Labor Board, supra*, 338, "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements by employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, . . ." The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.

As the National Mediation Board said in In The Matter of Representation of Employees of the St. Paul Union Depot Company, Case No. R 635; "Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the represented organization, as well as those who are members."[2]

Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.[3] It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not

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[2] The Mediation Board's decision in this case was set aside in Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees, 137 F. 2d 817, reversed on jurisdictional grounds 320 U. S. 715. The Court of Appeals was of the opinion that a representative is not only required to act in behalf of all the employees in a bargaining unit, but that a labor organization which excludes a minority of a craft from its membership has no standing to act as such representative of the minority.

The Act has been similarly interpreted by the Emergency Board referred to in General Committee v. Southern Pacific Co., 320 U. S. 338, 340, 342-343 n. It declared in 1937: "When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier all members of the craft or class share in the rights secured by the contract regardless of their affiliation with any organization of employees. . . . The representatives of the majority represent the whole craft or class in the making of an agreement for the benefit of all. . . ."

[3] Compare the House Committee Report on the N. L. R. A. (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22) indicating that although the principle of majority rule "written into the statute books by Congress in the Railway Labor Act of 1934" was to be applicable to the bargaining unit under the N. L. R. A., the employer was required to give "equally advantageous terms to nonmembers of the labor organization negotiating the agreement." See also the Senate Committee Report on the N. L. R. A. to the same effect. S. Rep. No. 573, 74th Cong., 1st Sess., p. 13.

be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co.* v. *Labor Board*, *supra*, 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. Cf. *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 509-510, 512 and cases cited; *Washington* v. *Superior Court*, 289 U. S. 361, 366; *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. Cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Hill* v. *Texas*, 316 U. S. 400.

The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Deitrick* v. *Greaney*, 309 U. S. 190, 200-201; *Board of County Commissioners* v. *United States*, 308 U. S. 343; *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176-7; cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363.

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.

Since the right asserted by petitioner "is . . . claimed under the Constitution" and a "statute of the United States", the decision of the Alabama court, adverse to that contention is reviewable here under § 237(b) of the Judicial Code, unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration. The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act, cf. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks* v. *United Transport*

*Service Employees*, 320 U. S. 715, 816, or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration. *General Committee* v. *M.-K.-T. R. Co., supra*, 332, 337. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board, *Switchmen's Union* v. *National Mediation Board, supra*; *General Committee* v. *M.-K.-T. R. Co., supra*. Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board.

Section 3, First (i), which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements", makes no reference to disputes between employees and their representative. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. "The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board." Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 4, p. 7. Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. Further, since § 3, First (c) permits the national labor organizations chosen by the majority of the crafts to "prescribe the rules under which the labor members of the Adjustment Board shall be selected" and to "select such members and designate the division on which each member shall serve", the Negro firemen would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made. In addition § 3, Second provides that a carrier and a class or craft of employees, "all acting through their representatives, selected in

accordance with the provisions of this Act", may agree to the establishment of a regional board of adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. *Tumey* v. *Ohio*, 273 U. S. 510. There is no administrative means by which the Negro firemen can secure separate representation for the purposes of collective bargaining. For the Mediation Board "has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives".[4]

In the absence of any available administrative remedy, the right here asserted, [illegible] to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. *Switchmen's Union* v. *National Mediation Board*, *supra*, 306; *Stark* v. *Wickard*, 321 U. S. 288, 306-7. Here, unlike *General Committee* v. *M.-K.-T. R. Co.*, *supra*, and *General Committee* v. *Southern Pacific Co.*, *supra*, there can be no doubt of the justiciability of these claims. As we noted in *General Committee* v. *M.-K.-T. R. Co.*, *supra*, 331, the statutory provisions which are in issue are stated in the form of commands. For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of

[4] National Mediation Board, The Railway Labor Act and the National Mediation Board, p. 17; see In the Matter of Representation of Employees of the Central of Georgia Ry. Co., Case No. R-234; In the Matter of Representation of Employees of the St. Paul Union Depot Co., Case No. R-635, set aside in Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees, 137 F. 2d 817, reversed on jurisdictional grounds, 320 U. S. 715.

employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in *Texas & New Orleans Ry. Co.* v. *Brotherhood of Railway Clerks, supra,* 556-557, 560, and in *Virginian Railway* v. *System Federation, supra,* 548, and like it is one for which there is no available administrative remedy.

We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty.

The judgment is accordingly reversed and remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

Mr. Justice BLACK concurs in the result.

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Mr. Justice MURPHY, concurring.

The economic discrimination against Negroes practiced by the Brotherhood and the railroad under color of Congressional authority raises a grave constitutional issue that should be squarely faced.

The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and to analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be.

The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it

cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals.

If the Court's construction of the statute rests upon this basis, I agree. But I am not sure that such is the basis. Suffice it to say, however, that this constitutional issue cannot be lightly dismissed. The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights by an organization purporting to act in conformity with its Congressional mandate. Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.

The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.